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LAW ASSOCIATION
OF
PHILADELPHIA

RECORD, CASE No. 14,063.

879

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 123.

HENRY M. BATES AND I. C. BATES WALLEY, PLAINTIFFS IN ERROR,

vs.

SARAH A. PREBLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JUNE 30, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 13, 1893.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

[Seal of the Circuit Court, Massachusetts.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, *between* Sarah A. Preble, of Portland, Cumberland county, State of Maine, and a citizen of the State of Maine, is plaintiff and Henry M. Bates, of Newton, Norfolk county, Commonwealth of Massachusetts, and I. C. Bates Walley, of Boston, Suffolk county, in said Commonwealth, copartners doing business under the firm name and style of H. M. Bates & Walley, and both being citizens of Massachusetts, are defendants and the Massachusetts National bank and Henry Lee, alleged trustees, in an action of tort or contract, a manifest error hath happened, to the great damage of the said Henry M. Bates and I. C. Bates Walley, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

2 Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twentieth day of June, A. D. 1890.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the Honorable Le Baron B. Colt, circuit judge.

4 SARAH A. PREBLE, of Portland, Cumberland County, State of Maine, and a Citizen of the State of Maine, Plaintiff,

v.

HENRY M. BATES, of Newton, Norfolk County, Commonwealth of Massachusetts, and I. C. Bates Walley, of Boston, Suffolk County, in said Commonwealth, Copartners Doing Business under the Firm Name and Style of H. M. Bates & Walley, and both Citizens of Massachusetts, Defendants. } 2810. Law Docket.

The Massachusetts National Bank of said Boston, a banking institution existing and established under the laws of the United States and having its usual place of business in said Boston, and Henry Lee, doing business in said Boston under the name and style of the Union Safe Deposit Vaults and being a citizen of Massachusetts, alleged trustees, in an action of tort, to which is joined a count in contract, the plaintiff being in doubt to which class the action belongs, both counts being for one and the same cause of action, to the damage of the said plaintiff, as she says, the sum of seventy-five thousand dollars.

Plaintiff's Declaration. (*Filed with Writ.*)

Count in tort.

And the plaintiff says that the defendants have converted to their own use the bonds, stocks, and moneys, the property of the plaintiff, mentioned in the schedule hereto annexed, to wit:

No. of items.

1. Eight (8) Minneapolis, Minnesota, 8 per cent. bonds of the par value of $1,000 each.
2. Three (3) Eastern Illinois 6 per cent. bonds of the par value of $1,000 each.

No. of items.

3. Three (3) Oregon Navigation Company bonds of the par value of $1,000 each.
4. Five (5) Chicago Sewerage Loan 7 per cent. bonds of the par value of $1,000 each and numbered respectively 1368, 1439, 1440, 1441, 1445.
5. Five (5) New York & New England railroad 7 per cent. bonds of the par value of $1,000 each.
6. One (1) United States 6 per cent. bond of the par value of $500.
7. Four (4) State of Maine 6 per cent. bonds of the par value of $1,000 each.
8. One (1) State of Maine 6 per cent. bond of the par value of $500.
9. Fifteen shares of Atlantic & St. Lawrenee R. R. stock of the par value of $100 each.
10. Eight (8) shares of Consolidated Virginia mining stock of the par value of $100 each.
11. Five (5) shares of Grand Prize mining stock of the par value of $100 each.
12. Thirty-five hundred dollars, being money collected from Lewis notes and paid to defendants for purchase of Best & Belcher and other stocks, never received of the defendants.
13. One thousand dollars, being money drawn from Provident Inst. for Savings and paid to the defendants.
14. One thousand dollars derived from sale of Central Pacific bond-.
15. Divers other stocks, moneys, and securities to the amount of $10,000.

Count in Contract.

And the plaintiff says the defendants owe her sixty thousand dollars for money received by the defendants to the plaintiff's use.

And the plaintiff says these two counts are for one and the same cause of action.

By her attorney, L. C. SOUTHARD.

The writ in this cause is dated the twenty-fifth day of January, A. D. 1887, and was duly entered at the May term of this court, A. D. 1887, when and where the parties appeared by their respective attorneys.

At the said May term the following answers of the alleged trustees were filed :

Answer of Massachusetts National Bank, Alleged Trustee. (*Filed May* 17, 1887.)

And now the Massachusetts National bank, a corporation summoned as trustee of the principal defendant in the above-entitled action, appears by Chas. W. Perkins, its cashier, and makes answer

that at the time of the service of the plaintiff's writ upon it it was indebted to said principal defendants in the sum of eight thousand five hundred and ninety-three and $\frac{59}{100}$ dollars, but had not at said time of service any other goods, effects, or credits of said defendant in its hands or possession; and of this the said Chas. W. Perkins submits himself to examination upon his oath.

THE MASSACHUSETTS NAT'L BANK
OF BOSTON,
By CHAS. W. PERKINS, *Cashier.*

6 SUFFOLK, *ss:*

MAY 17, 1887.

Then the above-named Charles W. Perkins made oath that the foregoing answer subscribed by him is true, before me—

WM. SULLIVAN,
Justice of the Peace.

Answer of Henry Lee, Alleged Trustee. (*Filed May* 17, 1887.)

And now *comes* said Henry Lee, summoned as trustee of the principal defendant in the above-entitled action, appears and makes answer that at the time of the service of the plaintiff's writ upon him he had not in his hands or possession any goods, effects, or credits of the said defendant.

Wherefore he prays that he may be discharged and for his costs.

HENRY LEE,
Manager and Proprietor.

Signed in presence of—
CHARLES S. RACKEMANN.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

BOSTON, *May* —, 1887.

Then the above-named Henry Lee personally appeared and made oath that the foregoing answer subscribed by him is true, before me—

CHARLES S. RACKEMANN,
Justice of the Peace.

At the said May term the following answer was filed:

Defendants' Answer. (*Filed June* 15, 1887.)

And the defendants come and deny each and every allegation contained in the plaintiff's writ and in each count of said declaration and each item of said schedule annexed.

By their attorney, SAM'L HOAR.

This cause was thence continued from term to term to the October term, A. D. 1888, when, issue having been joined, a jury was empanelled and sworn according to law to try the issue.

On the twelfth day of December the following motion was filed and allowed by the court:

Motion to Amend Answer. (*Filed Dec.* 12, 1888.)

And the said defendants come and move to be allowed to amend their answer as follows:

7 And the defendants say that all and singular the causes of action mentioned in the plaintiff's writ and declaration did not accrue within six years before the suing out of the plaintiff's writ.

By their attorney, SAM'L HOAR.

On the eighteenth day of December the following reply to defendants' answer, that cause of action accrued more than six years before suit, was filed:

Reply to Defendants' Answer that Cause of Action Accrued More than Six Years Before Suit. (*Filed Dec.* 18, 1888.)

And now comes the plaintiff, and, for reply to the defendants' answer that the cause and causes of action therein mentioned accrued to the plaintiff more than six years before the commencement of said action, says that the defendants, by themselves and their confederates, fraudulently concealed said cause and causes of action from the knowledge of the person entitled to bring the same, to wit, the plaintiff, and said action was commenced within six years after the plaintiff discovered that she had such cause and causes of action, and this she is ready to verify.

By her attorney, BENJ. F. BUTLER.

The cause was thereupon committed to the said jury, who, after hearing all matters and things concerning the same, returned their verdict and upon oath said: "The jury find for the plaintiff and assess damages in the sum of thirty-four thousand seven hundred and seventy-two dollars and eighty-eight cents, including interest to December 19, 1888." The following schedule was brought in by the jury and handed up to the court with their verdict:

Schedule.

$8,000.	Minneapolis 8's	$8,000	
	Premium on same, @ 1.15	1,200	
	Int. on same to June, 1882, inc.	1,600	
	Int. on $9,600 from June 1, '82, to Dec. 19, '88	4,691	
$1,000.	Eastern Ill.'s, @ .94	940	
	Int. after Dec. 1, 1879, to June 1, 1882, 6 %	150	
	Int. on $1,150 from June 1, '82, to Dec. 19, '88	451	95
$3,000.	Oregon railway navigation 6's, @ .93	2,790	
	Int. after Dec. 1, '79, to June 1, 1882, 2½ years, @ .06	450	
	Int. from June 1, '82, to Dec. 19, '88	1,355	85

$5,000.	Chicago sewerage loan, 7's	$5,000	
	Premium, @ 1.13	650	
	3 years' int. from Jan., 1880, to July, 1882, inc., @ 7 %	1,050	
	Int. from July 1, '82, to Dec. 19, '88	2,738	63
8			
$2,000.	New York and New England railroad, 7 % bonds	2,000	
	Premium @ 109½	190	
	Int. from Jan., 1880, to July, 1882, inc., 3 years, @ 7 %, .21	420	
	Int. from July 1, '82, to Dec. 19, '88	1,095	45
		$34,772	88

On the twenty-first day of December the following motion was filed:

Defendants' Motion for New Trial. (*Filed Dec.* 21, 1888.)

And now come the defendants, after verdict against them in the above-entitled action, and move that said verdict be set aside and a new trial granted, and they assign the following reasons thereof:

1st. That said verdict is against the evidence and the weight of evidence.

2nd. That said verdict is against the law and the instructions of the court.

3rd. That the damages awarded in said verdict are excessive.

4th. That the jury have included in their verdict bonds, and the interest thereon, which, upon the evidence, were never received by the defendants.

5th. That the jury have included in their verdict bonds which, upon the evidence, were never the property of the plaintiff.

6th. That the jury have erred in their computation of interest.

By their attorney, SAM'L HOAR.

On the twenty-second day of said December the court entered an order, the counsel for plaintiff consenting thereto, that the defendants have twenty days from said twenty-second day of December to file bill of exceptions.

On the second day of January the following motion was filed:

Defendants' Additional Motion for New Trial. (*Filed Jan.* 2, 1889.)

And now come the defendants, after verdict against them in the above-entitled action, and move that said verdict be set aside and a new trial granted, and they assign the following reasons therefor:

At the trial of said action, Edward Preble, the principal witness for the plaintiff, testified in substance that when the five Chicago sewerage loan 7 % bonds, which are described in the fourth item of the plaintiff's declaration and for which the defendants are held

liable in and by said verdict, were delivered by him to the defendants there then were across the face of each of said five bonds the words "the property of Sarah A. Preble;" that said words were written in ink and in the handwriting of Edward Richardson.

Said testimony was very material to the issue tried in said action, so that the presiding justice instructed the jury as follows: "I ought to have said, on the question of the defendants having notice, that if you find upon the evidence that these bonds and securities were endorsed 'the property of Sarah A. Preble' at the time that they passed into the hands of the defendants, if any property did so pass, why then, of course, that would be sufficient notice to charge them with knowledge as to who was the actual owner of the property."

Said testimony was entirely unexpected and a surprise to the defendants, and the defendants were entirely unprepared to contradict or meet said testimony during said trial, and, although they made diligent search and inquiry during the progress of said trial, they were unable to offer any direct evidence at said trial to prove its falsity, and, although they had made great efforts to ascertain the fact, they did not learn before the rendering of said verdict that said bonds were in existence, or that said testimony could be directly contradicted.

After more than two days after said verdict was rendered the defendants learned that said five Chicago sewerage bonds, being numbered respectively 1368, 1439, 1440, 1441, and 1445, were still in existence in the city of Chicago, in the State of Illinois, and said bonds have since been brought into the district of Massachusetts and can now be produced in court and when produced will show that the words "the property of Sarah A. Preble" or any of them are not now and never were written upon the face of any of said bonds.

SAM'L HOAR,
Attorney for Def'ts.

On the eleventh day of January, 1889, the counsel for the defendants took defendants' proposed bill of exceptions to the clerk's office of this court and handed it to a deputy clerk, who wrote upon it, "Rec'd Jan. 11, 1889."

On the twenty-eighth day of January the following motions were filed:

Motion to Set Aside Motion for New Trial. (*Filed Jan.* 28, 1889.)

And now comes the plaintiff and moves the court here that the several motions of the defendants made after verdict for a new trial be set aside and not allowed and held for naught—

Because she says that the first motion for a new trial, which was filed within two days, the time allowed by the 26th rule of the court in which any motion for a new trial or arrest of judgment can be filed and be heard, has been waived by the filing of a subsequent

motion for a new trial on newly discovered evidence, filed afterwards; which said motion sets forth accumulative evidence only upon a point made in the defence as well as in the prosecution of the case, upon which evidence was given on both sides and the facts discussed and presented to the jury.

Second. And said last-mentioned motion for a new trial should not be allowed for the reasons before stated, and also because the questions of evidence claimed to be newly discovered, even if not accumulative in character, were well known to the defendants before, at, and during the time of the trial, which occupied the court for a period of more than nine days, and could have been produced by the defendants before the jury if they had chosen so to do and not to hold it back at an opportunity for a motion for a new trial.

Again, because the affidavit of the defendants, while not denying the existence of the bonds the production and character of which make the foundation of the motion, nowhere alleges that they made any attempt or took any means whatever to procure the same while the trial was going on.

And lastly that said motion should not be heard because it was not filed within the time allowed by rule 26 of the law rules of this court.

By BENJ. F. BUTLER,
Her Attorney.

Motion to Dismiss Exceptions. (*Filed Jan.* 28, 1889.)

And now comes the plaintiff and moves that the bill of exceptions filed by the defendant after verdict in said cause be not signed or allowed or made any part of the record of this court because she says that before said exceptions were filed or presented to the court or any time had been granted by the court in which they might be filed the defendant had filed a motion for a new trial on the ground that the verdict was against the weight of the evidence and against the law, which motion has been insisted on after the time in which the defendants were allowed to file their exceptions; and that afterwards the defendants filed another motion for a new trial on the alleged ground of newly discovered evidence, and insisted upon and pressed the same to a hearing while their bill of exceptions was still pending, whereby they waived said bill of exceptions, and that said exceptions are not therefore to be allowed and signed by the court.

By her attorney, B. F. BUTLER.

Said motions, filed January 28, 1889, were thereupon heard by the court, and on the fifth day of March, 1889, the opinion of the court was announced and an order entered overruling said motions, and leave was granted to the defendants to amend their motion for new trial.

On the twenty-first day of March the following motion was filed:

Defendants' Motion to Amend Their Motion for New Trial. (*Filed March* 21, 1889.)

And now come the defendants in the above-entitled case and move to amend their motion for a new trial, which was filed
11 December 21st, 1888, as follows:

1. By making their additional motion for a new trial, filed January 2nd, 1889, an amendment of said original motion for a new trial.

2. By striking out the words "the law and" in the 2d reason assigned in said original motion.

3. By inserting the words "weight of the" before the word "evidence" in the second line of the 4th reason assigned in said original motion.

4. By inserting the words "weight of the" before the word "evidence" in the second line of the 5th reason assigned in said original motion.

By their attorney, SAM'L HOAR.

This cause was thereupon set down for hearing and was fully heard upon the defendants' motion for new trial and was thence continued under advisement to the May term, A. D. 1889, when, on the twenty-third day of August, the opinion of the court was announced and the plaintiff was granted leave to elect to take judgment for $31,136.35 or a new trial would be granted.

On the twenty-seventh day of August the following motion was filed:

Defendants' Motion for a Rehearing upon Motion for a New Trial. (*Filed Aug.* 27, 1889.)

And now come the defendants and respectfully ask for a rehearing upon their motion for a new trial, already filed and heard in said case, upon the following grounds, namely:

One of the reasons assigned by the defendants for a new trial was that the jury erred in their computation of interest. This appeared from the paper handed to the court with the verdict containing the special items upon which the defendants were found liable, and the court, in considering the motion for a new trial, has omitted to rectify the apparent errors in the computation of interest; and that these are errors appears from the allowance of interest made by the court in respect to items of the verdict which are ordered remitted.

By their attorney, SAM'L HOAR.

On the eleventh day of September the following remittitur was filed:

Remittitur. (*Filed Sept.* 11, 1889.)

And now comes the plaintiff in the above-entitled action and of the verdict rendered in her favor remits the sum of thirty-six hundred and thirty-six and $\frac{53}{100}$ dollars.

By her att'y, L. C. SOUTHARD,
Of Counsel for Plaintiff.

12 On the said 11th day of September the following motion was filed:

Motion for Judgment. (*Filed Sept.* 11, 1889.)

And now comes the plaintiff in the above-entitled action and moves that judgment be entered in favor of the plaintiff for the sum of thirty-one thousand one hundred and thirty-six and $\frac{35}{100}$ dollars and interest thereon from Dec. 20th, 1888, the date of the verdict—

Being the amount of the verdict	$34,772 88
Less the amount remitted	3,636 53
To wit	$31,136 35

And for costs of suit.

By her attorney, L. C. SOUTHARD,
Of Counsel for Plaintiff.

On the thirtieth day of September the following motion was filed:

Motion to Withdraw Remittitur. (*Filed Sept.* 30, 1889.)

And now comes the plaintiff in the above-entitled case and moves for leave to withdraw her remittitur, filed in accordance with the opinion of the court Aug. 23rd, 1889, for the reason that since the filing of said remittitur the defendants have asked for another deduction from the amount of said verdict.

By her attorney, L. C. SOUTHARD.

This cause thereupon came on to be heard and was fully heard by the court on defendants' motion for rehearing of motion for new trial, and, the said motion being granted, the cause was reheard upon defendants' motion for new trial and upon plaintiff's motion to withdraw remittitur.

On the eleventh day of October, 1889, the opinion of the court was announced and the plaintiff was granted leave to elect to take judgment for $28,496.52 or a new trial would be granted, and an order was entered granting motion to withdraw remittitur filed after the first decision on the motion for a new trial.

On the twelfth day of October the following remittitur was filed:

Remittitur. (*Filed Oct.* 12, 1889.)

And now comes the plaintiff in the above-entitled action and of the verdict rendered in her favor remits the sum of six thou-
13 sand two hundred and seventy-six and $\frac{36}{100}$ dollars, under compulsion.

By her attorney, L. C. SOUTHARD.

On the said twelfth day of October the following motion for entry of judgment was filed:

(*Motion for Entry of Judgment. Filed Oct.* 12, 1889.)

And now comes the plaintiff in the above-entitled action and moves that judgment be entered in favor of the plaintiff for the sum of twenty-eight thousand four hundred and ninety-six and $\frac{52}{100}$ dollars and interest thereon from Dec. 20th, 1888, the date of the verdict—

Being the amount of the verdict	$34,772 88
Less the amount remitted	6,276 36
To wit	$28,496 52

And for costs of suit.

By her attorney, L. C. SOUTHARD.

This cause was thereupon heard upon the foregoing motion for entry of judgment, when, the defendants claiming an allowance of a bill of exceptions, this cause was ordered to stand continued to the next October term of this court.

The cause being continued to this present October term, A. D. 1889, the same comes on to be heard and is reheard upon the question whether a bill of exceptions can now be allowed, the plaintiff filing at and before the said hearing the following protest:

Protest. (*Filed Oct.* 30, 1889.)

And now comes the plaintiff on notice — respectfully protests against being called upon to appear at this term to hear or discuss in *my* case heard and tried at the late term of said court, and a verdict found in her behalf, and a motion for a new trial by the defendants then overruled.

By her attorney, BENJ. F. BUTLER.

On the second day of November this cause is further heard upon the question whether a bill of exceptions can now be allowed.

On the tenth day of December the opinion of the court that the bill of exceptions in this case, filed by the defendants with the clerk, is properly before the court is announced.

On the twenty-ninth day of March the following motion is filed:

14 *Motion for Judgment, etc.* (*Filed March* 29, 1890.)

And now comes the plaintiff and moves the court here at this day, no exceptions ever having been properly taken or filed in this court in this case, as appears of record, that the same be set aside and disallowed, and that judgment be entered upon the verdict, with interest and costs.

2. That a jury trial having been had in this case and a verdict given on the 20th day of December, 1888, and no exceptions having yet been allowed by the court and no movement on the part of the defendant- that they be allowed, his laches and delays for so long a time entitle the plaintiff to have judgment, or, if not, that some judgment be entered in the case, so that the party aggrieved may bring a writ of error.

3. That by the action of the defendants in regard to this case, their laches and delays and several motions, they have waived their said bill of exceptions, no notice having been given at any time to the plaintiff that any exceptions had been filed.

BENJ. F. BUTLER,
Attorney for Plaintiff and of Counsel.

On the first day of April the foregoing motion is heard by the court, when the defendants call attention of the court to their bill of exceptions and ask that the same be allowed. On the fifth day of April the defendants' exceptions are allowed and signed and are ordered to be filed and are filed accordingly, and the motion of plaintiff for entry of judgment, etc., filed March 29, is denied by the court except as to the entry of judgment.

The said bill of exceptions is in the words and figures following:

Defendants' Exceptions. (*Filed April* 5, 1890.)

This was an action containing two counts, the first in tort and the second in contract, with a statement that both counts were for the same cause of action.

At the trial the plaintiff elected to strike out the count in contract and to go to the jury upon the count in tort only, which count was for the conversion of certain bonds and stocks, the property of the plaintiff.

The writ was dated January 25th, 1887.

The plaintiff was a widow and a resident of Portland, Maine. The defendants were stock brokers and residents of Massachusetts, doing business at Boston as copartners under the firm name of H. M. Bates & Walley.

The plaintiff claimed and offered evidence tending to show that she obtained under her husband's will certain securities consisting of stocks and bonds; that those securities for a considerable period of time were in a box in the Union Safe Deposit Company, in

Boston; that she entrusted the key to the box and access to
15 the vaults of the safe deposit company to her son, Edward Preble; that her son, during a part of their absence in California, left with Walley, one of the defendants, the key to this box; that she visited the box in 1878, during her son's absence in Europe, and found her securities all there; that after 1878 and until the year 1882 she from time to time entrusted her son with the key to the box and with access thereto, and that in the summer of 1882 she went to the box herself and found all her securities gone and the box practically empty. She claimed that her son, without her authority, pilfered and stole or embezzled her various securities from time to time from the year 1878 until the year 1882 and used them in stock speculations through the firm of the defendants, and that by and through said speculations said securities were all lost. She claimed that the defendant Walley had knowledge at the time of each of the transactions with her son that the securities used by him were her property, and that they, defendants, were therefore liable to her in this action.

There was evidence tending to show that the plaintiff's only child, Edward Preble, was born in 1855 and went to Santa Barbara, California, with his mother in 1875; that at the time she was possessed of certain securities, consisting of stocks and bonds, which she left in the charge of Edward Richardson, of Cambridge, Massachusetts, who kept them in the Union safe deposit vaults in Boston; that said Richardson died in 1876, and just before his death the plaintiff sent her son home from California, while she remained there. The plaintiff was a witness at the trial and was asked in her examination-in-chief what instructions, if any, she gave her son when she sent him home, to which question the defendants objected. The court admitted the question and defendants excepted, and the plaintiff answered that she told him to take charge of the property from Mr. Richardson and to leave it in the safe deposit vaults.

The plaintiff testified that her son returned to California from Massachusetts, and she was then asked in her direct examination whether her son informed her what he had done with the property and what he reported he had done with it, to which questions the defendants objected. They were admitted by the court and the defendants excepted, and the witness testified that he told her that he had placed it in said safe deposit vaults, in care of Bates & Walley.

The plaintiff testified that she returned from California in 1877; that she went to the safe deposit vaults and examined the securities in the box there in the summer of 1878. She testified that she changed twenty-eight hundred 4 % Government bonds into bonds of the Oregon Navigation Company and thirty shares of Old Colony railroad stock into Eastern Illinois bonds; that she did not sell any other of her property.

She was asked in her direct examination, "Did you authorize any to be sold?" to which question the defendants objected. It was admitted by the court and the defendants excepted.

She was asked in cross-examination, "Did you state to your counsel in this suit the amount of your claim?" This was objected to

14 *Motion for Judgment, etc.* (*Filed March* 29, 1890.)

And now comes the plaintiff and moves the court here at this day, no exceptions ever having been properly taken or filed in this court in this case, as appears of record, that the same be set aside and disallowed, and that judgment be entered upon the verdict, with interest and costs.

2. That a jury trial having been had in this case and a verdict given on the 20th day of December, 1888, and no exceptions having yet been allowed by the court and no movement on the part of the defendant- that they be allowed, his laches and delays for so long a time entitle the plaintiff to have judgment, or, if not, that some judgment be entered in the case, so that the party aggrieved may bring a writ of error.

3. That by the action of the defendants in regard to this case, their laches and delays and several motions, they have waived their said bill of exceptions, no notice having been given at any time to the plaintiff that any exceptions had been filed.

BENJ. F. BUTLER,
Attorney for Plaintiff and of Counsel.

On the first day of April the foregoing motion is heard by the court, when the defendants call attention of the court to their bill of exceptions and ask that the same be allowed. On the fifth day of April the defendants' exceptions are allowed and signed and are ordered to be filed and are filed accordingly, and the motion of plaintiff for entry of judgment, etc., filed March 29, is denied by the court except as to the entry of judgment.

The said bill of exceptions is in the words and figures following:

Defendants' Exceptions. (*Filed April* 5, 1890.)

This was an action containing two counts, the first in tort and the second in contract, with a statement that both counts were for the same cause of action.

At the trial the plaintiff elected to strike out the count in contract and to go to the jury upon the count in tort only, which count was for the conversion of certain bonds and stocks, the property of the plaintiff.

The writ was dated January 25th, 1887.

The plaintiff was a widow and a resident of Portland, Maine. The defendants were stock brokers and residents of Massachusetts, doing business at Boston as copartners under the firm name of H. M. Bates & Walley.

The plaintiff claimed and offered evidence tending to show that she obtained under her husband's will certain securities consisting of stocks and bonds; that those securities for a considerable period of time were in a box in the Union Safe Deposit Company, in

Boston; that she entrusted the key to the box and access to
15 the vaults of the safe deposit company to her son, Edward Preble; that her son, during a part of their absence in California, left with Walley, one of the defendants, the key to this box; that she visited the box in 1878, during her son's absence in Europe, and found her securities all there; that after 1878 and until the year 1882 she from time to time entrusted her son with the key to the box and with access thereto, and that in the summer of 1882 she went to the box herself and found all her securities gone and the box practically empty. She claimed that her son, without her authority, pilfered and stole or embezzled her various securities from time to time from the year 1878 until the year 1882 and used them in stock speculations through the firm of the defendants, and that by and through said speculations said securities were all lost. She claimed that the defendant Walley had knowledge at the time of each of the transactions with her son that the securities used by him were her property, and that they, defendants, were therefore liable to her in this action.

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The plaintiff testified that her son returned to California from Massachusetts, and she was then asked in her direct examination whether her son informed her what he had done with the property and what he reported he had done with it, to which questions the defendants objected. They were admitted by the court and the defendants excepted, and the witness testified that he told her that he had placed it in said safe deposit vaults, in care of Bates & Walley.

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She was asked in her direct examination, "Did you authorize any to be sold?" to which question the defendants objected. It was admitted by the court and the defendants excepted.

She was asked in cross-examination, "Did you state to your counsel in this suit the amount of your claim?" This was objected to

by the plaintiff's counsel, was excluded by the court, and the defendants excepted.

She testified on cross-examination that she had a prior suit against these same defendants in the State court, and she was asked
16 on cross-examination if she intended to prosecute it. This question was excluded by the court and the defendants excepted.

She was asked, "Have you directed that suit to be discontinued?" This question was excluded and the defendants excepted.

The plaintiff's deposition was taken on behalf of the plaintiff in the summer of 1887. It was returned to court, was opened by the plaintiff, and filed in court at the opening of the case. Annexed thereto was a memorandum book. This book was separated from the deposition and handed to the plaintiff when she was a witness. She testified in chief that it was her own book, in her own handwriting, never seen by any one till it went into the hands of counsel; that the entries were made in it from time to time; that it showed the securtties which she had, which went into the box in the safe deposit vaults. Upon her examination-in-chief she was shown one page, which she testified was cut from an earlier memorandum book kept by her, and which was pinned into this book. She testified that that page showed what securities she had in her box in 1878. That page was as follows:

1877 to 1878 (in pencil).

Valuation of Property.

$4,800 U. S. registered bonds.
500 U. S. R. bonds.
500 Oregon war loan, coupon.
1,000 Central Pacific R. R., coupon.
5,000 Chicago bonds, coupo-.
2,000 Old Colony R. R., 20 shares.
1,500 Grand Trunk R. R., 15 shares.
500 Ten-forties, 10-40, U. S., coupon.
8,000 State of Main- bonds, coupo-.
8,000 Minneapolis bonds, coupo-.
3,400 mortgage notes, T. C. Lowis.
$350 Provident savings bank.
500 " " "
2,500 house, Stone St., Portland.
1,140 mortgage, Santa Barb.
3,000 15 (sh's G. Prize) (in pencil).
600 15 (con. Virginia, State of Maine) (in pencil).
1879 my son sold for m- 500 10-40.
Purchased 50 sha's Gr'nd Prize (both lines in pencil).
50,990 value (in 1871) (in pencil).

The plaintiff offered that page in evidence and it was admitted against the objection and subject to the exception of the defendants. The plaintiff, without further testimony about said book, then

offered the rest of the book in evidence, to which the defendants objected, and the court directed that the plaintiff's counsel should point out which parts of the book they relied on. Subsequently, at the trial and after the close of the defendants' testi-
17 mony the plaintiff's counsel offered in evidence the first and second leaves, the third, fourth, fifth, sixth, seventh, eighth, and ninth leaves, and page marked X, copies of which are annexed to these exceptions and marked Exhibit A; to which the defendants objected on the ground that it was not offered at the proper time; on the ground that it was not competent evidence, and upon the further ground that other parts of the book were not sealed up or covered or removed, so that they could not be examined by the jury.

The court admitted those leaves and pages in evidence and directed that the rest of the book should be sealed up or otherwise protected from the inspection of the jury, and the defendants excepted.

After the close of the case and when the jury were about to retire to consider their verdict, the plaintiff offered to send the whole book to the jury without any sealing or other protection of the leaves and pages not put in evidence; to which the defendants objected. The court directed the jury not to examine any part of the book except what was put in evidence and permitted the whole book, with that instruction, to go to the jury; to which the defendants excepted. Copies of other pages, which were thus unprotected from the inspection of the jury, marked Exhibit B, are hereto annexed and made part of these exceptions.

The plaintiff called as a witness her son, Edward Preble, who was asked upon direct examination what instructions he received from his mother about her property, which was in the hands of Edward Richardson. To this question the defendants objected, the court admitted it, and the defendants excepted, and the witness answered that his mother told him, "You will have to go home, Edward, as I cannot, and look after my property, and put it in the Union Safe Deposit vaults."

The witness testified on his direct examination that there were two bank books of deposit in the Provident Institution for Savings, one in his mother's name and one in his own name; that he had an order from his mother to draw out the deposit standing in her name; that Mr. Walley, one of the defendants, took him to the bank and identified him, and the money upon both books was drawn out for the purpose of purchasing ten shares of Old Colony stock; that he gave the money to the firm of Bates & Walley for that purpose, and that ten shares of Old Colony stock were purchased and the certificate made out in the name of Edward Preble. He was then asked on direct examination whether his mother understood that those shares were her property; to which the defendants objected, and the court admitted the question, and the defendants excepted. The witness testified that she thought they stood in her own name and understood that they were her property.

On cross-examination the witness was asked, "Were you in good standing, financially, among your acquaintances in the fall of

1879?" This question was objected to by the plaintiff. Defendants' counsel said that he desired to show by the witness that he did not undertake to resort to anything else except to his mother's property, which he intended to steal; that he did not resort to the ordinary methods which other men would use to raise money at that time. The court excluded the question and the defendants excepted.

On cross-examination the witness was asked whether he
18 did not bring a suit in the State court against Messrs. Bates & Walley, and he testified that he did. He was asked whether he did not claim at that time that he was the owner of the Minneapolis 8 % bonds and New York & New England railroad bonds and other securities claimed by his mother in this suit, and he testified that he did not. He was then asked on cross-examination, "Upon what property, as being your property, have you brought a suit against Messrs. Bates & Walley, which is now pending?" This question was excluded, and the defendants excepted.

The plaintiff testified on her direct examination that when she went to her box, after her son was arrested, in 1882, she found no securities there, but only a certificate of shares in the Grand Prize Mining Company, some family papers, and a few empty envelopes; that on the envelopes was written the name of the stock or bonds and the words, "The property of Sarah A. Preble;" that she took those envelopes home and she did not know what had become of them.

On cross-examination she testified that she did not know but what they were burned up; that she did not remember that her son took them or what she did with them.

Counsel for the defendants then took the deposition of the plaintiff, which was opened and filed by the plaintiff's counsel in the case, and, looking at it, asked the plaintiff whether she was not asked, when she gave her deposition in the summer of 1887, whether she did not take the envelopes from the safety-deposit vaults and bring them away with her, and she said she did so testify. She was then asked whether she did not testify, when she gave her deposition, in answer to the question, "Have you got them now?" as follows: "They were useless; I don't know but my son has got them; yes, he has some of them; it was the Minneapolis bonds, the Chicago bonds, the State of Maine bonds, and a number of others;" and she answered, "If it is there, I said so."

The defendants produced as a witness I. C. B. Walley, one of the defendants, and he testified, upon his direct examination, that he was present at Portland in the summer of 1887 when Mrs. Preble gave her deposition. He was then asked whether he heard her say anything at that time as to where and in whose possession those envelopes were (referring to the envelopes concerning which she testified). To this question the plaintiff objected, the court excluded it, and the defendants excepted.

The defendants offered in evidence the two interrogatories and answers in the plaintiff's deposition concerning which she testified as aforesaid; they were excluded by the court unless the de-

fendants would offer the whole deposition; the defendants declined to do this and excepted to the exclusion of the evidence.

After the close of the defendants' testimony Edward Preble was recalled on behalf of the plaintiff, in rebuttal, and testified on his direct examination that at some time which he could not recall Walley received from him a five-hundred-dollar United States bond; that his mother's name was on the face of it; that Walley wanted him to go and get some eraser to get the name off, because the name on the face of the bond had a tendency to depreciate its market value; that he went to a Mr. Carter and asked him if he had any preparation to take the ink off, and Carter said that it was illegal to sell it, and that he gave the bond to Walley with
19 the name on it.

On cross-examination he testified that he forgot this fact when he testified before in this case; that it had come to him during wakeful nights. He was asked if he had ever communicated that fact to anybody before the case was begun; he said he had, to Mr. L. C. Southard, junior counsel for the plaintiff, in whose office he had been for eighteen months; that he did this prior to the bringing of this suit; that he didn't remember ever having brought it to the attention of Messrs. Wadleigh, Fish & Wellman, who were counsel in the suits in the State court.

The plaintiff then called as a witness her junior counsel, L. C. Southard, Esq., and asked him whether Edward Preble told him that Walley advised him to erase the writing on the five-hundred-dollar United States bond; to which question the defendants objected. It was admitted by the court, and the defendants excepted, and the witness answered that he did, at one of the earliest conversations with him.

The defendants offered the record of the superior court in the county of Suffolk in the case of Edward Preble against these same defendants, for the purpose of contradicting the witness Edward Preble and for the purpose of showing that in 1884 he claimed to be the owner of many of the securities sued for in the case at bar, and that said suit was still pending. This evidence was excluded by the court, and the defendants excepted.

The defendants offered the record of said superior court in the case of Sarah A. Preble against these defendants, consisting of the writ, plaintiff's declaration, defendants' answer, the interrogatories filed by the defendants to be answered by the plaintiff, and the plaintiff's answers thereto, for the purpose of showing that in 1883 she claimed to be the owner of a small portion only of the securities sued for in the case at bar, and that said suit was still pending, and for the further purpose of contradicting the plaintiff.

This evidence was excluded by the court, and the defendants excepted.

The plaintiff testified that she went to Santa Barbara, California, in 1875; her son Edward went with her. She left her securities with Edward Richardson, of Cambridge, and they were put into the Union Safe Deposit vaults; that Mr. Richardson had the key in her absence; that she received news of the illness of Mr. Richard-

son and she sent her son home, while she remained in California. She remained in Santa Barbara two years; had no securities with her at Santa Barbara; that the first time after she returned from Santa Barbara that she went to the safe deposit vaults was in 1878; her nephew went with her; her son was then in Europe; that she had no key to open the box, and her nephew took it out and had the lock broken and brought it back; she then found all her securities there; that she went there to get some notes known as the Lewis notes; she took them out and sent them to Saco, and they were paid and the money returned to her, about thirty-four hundred dollars; she kept the proceeds some time, and it was afterwards put into New York & New England or Southern Pacific bonds; that her impression was it was Southern Pacific bonds it was put into, and they were placed in a new box which was given her; she put all her securities into this new box and took the key with her; she did not go to the box again until 1882; that in 1882 she was informed by Bates Walley, one of the defendants, that her son was in trouble, and in two or three days after that she went to the box again and opened it and found a few empty envelopes and nothing more except a few family papers she had placed there; that after she went to the box in 1878 she did not know of any securities being taken away from there except that in the winter of 1881 she changed some twenty-eight hundred dollars of Government 4 % bonds into Oregon Navigation bonds, and thirty shares of Old Colony stock into Eastern Illinois bonds; that she was very sure that she changed nothing more; that she did not sell any; that she got no money for any; that she could tell what securities she had in her box from her book; that she first knew of an acquaintance between her son and Bates Walley before they went to Santa Barbara; he was then eighteen or nineteen years old; that Walley came to her house frequently to see her son; that she seldom saw him; that he used to take her son out to ride; that she knew that her son used to go to his office and was interested in stock transactions; that he then had a desire to go into the stock business if he could get a suitable partner. The last interview that she had with Mr. Walley was in 1882, in the autumn. Walley called on her at Roxbury one evening late. "I met him in the parlor. He told me that Ned was in trouble; that he had been arrested for two thousand dollars by some company in New York." That she said, "Why don't you assist him?" He said, "I have no money to do so." I said, "I will do so. I have my property. I will sell some of my Minneapolis bonds or some of my stock and release him at once." He then said, "Ned has been speculating and I am afraid it is all lost," and I said, "What, my Minneapolis bonds, my Chicago bonds?" and he said, "I only know about two thousand Minneapolis bonds." Within two or three days I went to the vault and found nothing. On the envelopes in my box were written the names of the stock and bonds and my name—the words "the property of Sarah A. Preble."

On cross-examination she testified with reference to the first page of her memorandum book; that the figures at the top in pencil she

put there when she took the page out of the other book and put it into that book; those figures in pencil were 1877 and 1878; that she did not remember at what time she did this; that it was before 1882 and was after she cut it out of the other books; that she didn't remember when she became possessed of the Grand Prize stock; that it was after she came from Santa Barbara, but had no memorandum; that she put it on the book at the time the transfer was made; that she had the certificate of Grand Prize stock in her box; that she saw it there when she went to her box and found the empty envelopes. The certificate of Grand Prize was in the box in 1882; she considered it then of no value; that she never saw any certificate of consolidated Virginia stock; that she had no memorandum except what was on that paper in the book; that some of it was written in ink and some in pencil; that what was in ink was written when it was in the other book; that the pencil part was written after it was put into this book; that the summing up was made by her, but was not correct; that at the bottom of the page the value appeared to be as of 1871; that she didn't know whether it was its correct value in 1871 or in 1877; that she had testified from that page of the book and from no other part; that she went to her vault in 1878 with her nephew; that her son then had the key to the box
21 and was in Europe, and that after the box was opened she saw her papers were all there. She looked into each envelope and saw that all were there; that she had no recollection of seeing the Grand Prize certificate at that time; that she did see there at that time eight thousand dollars State of Maine 6 % bonds, and eight thousand dollars Minneapolis 8 % bonds, five thousand dollars Chicago sewerage 7 % bonds, and one thousand dollars Central Pacific bond-, and thirty shares of Old Colony stock; that she didn't remember seeing any other, but supposed that all were there; that the book says twenty shares of Old Colony stock; that she didn't remember that she had thirty shares as early as 1878. She didn't remember looking at the number; that she knew at some time that she had thirty shares of Old Colony stock, but she didn't remember the time; that she didn't have the key to the box when Mr. Richardson had control of it; that when she got back from California she had one; that no one else had one; that her son used to come to her for her key, and at one time there were two keys. She didn't remember whether before or after she went to Santa Barbara; that directly after she came back from California she didn't think she had the key; that her son must have had it; that whatever dividends or interest she got she got through her son when she came back from California; that her son took the key to Europe with him, and the box had to be broken open, and she had a new box and kept the key until her son got back from Europe in 1878; that she then gave it to him, and didn't have it after that. She didn't remember having the key after that; that in 1882 her son sent her the key, and she went to the box with it and found the empty envelopes and the Grand Prize certificate; that she took the envelopes out and asked the attendant to give her an envelope to put them in, and that he took them away and brought them back

in an envelope; that she then took them home to Roxbury, and didn't remember whether her son took them or what she did with them; that she exchanged the Old Colony stock, signed her name on the back of the certificate, and delivered it to her son; that she never received anything for them in return; that was some time in 1881, she thought. She thought there was only one certificate, but might be mistaken. She made a transfer of twenty-eight hundred dollars of 4 % United States bonds into Oregon 6's; that she gave her power of attorney to transfer the United States bonds to her son; they were registered bonds; that she brought a suit in the State court; Mr. Bainbridge Wadleigh brought it for her; that she didn't remember whether she furnished him with a copy of the power of attorney; that she had an impression she only gave her son one power of attorney, and that that was at some time about the winter of 1880 or 1881; that she never saw any Oregon Navigation 6 % bonds, and never received or saw any Eastern Illinois bonds; that she had no personal knowledge about the sale of the Old Colony stock, except that she gave the certificate endorsed to her son; that she never had any New York & New England 7 % bonds in her possession, and never saw them in her box; that the first item on the first leaf of the book was forty-eight-hundred-dollar United States 4 % bond; that she had told what was done with twenty-eight hundred dollars of them, but didn't know what was done with the other two thousand dollars; that she must have sold them, but didn't remember the time; that she didn't know what was done with the five-hundred-dollar United States 6 %
22 bond; didn't remember when that was disposed of or in what way; that five-hundred-dollar Oregon war loan bond, she didn't remember what she did with that; she didn't recall it; she couldn't say whether it was called in or exchanged; it was one or the other, she didn't know which; that thousand-dollar Central Pacific railroad bond she saw in her box in 1878; she didn't know what became of it; she never disposed of it. The five thousand dollars Chicago sewerage bonds were in her box in 1878; that she didn't know when she received the last dividend from them, but thought she did in 1880; couldn't tell whether she did in 1881 or not; that she didn't go to the box; she was then an invalid, and her son used to bring the dividends when she wanted it; that when she wanted money he brought it to her; that when she didn't want it she said to him, "Edward, I don't want this, and you can have it;" that she left to him all of the dividends and interest which she didn't herself need; that she received the dividends on the Old Colony stock until she signed the certificate; that when her son was in Europe, and once in Santa Barbara, she got the dividends on the Old Colony stock through Bates Walley; that the five-hundred-dollar 10-40 bond went into Grand Prize stock; that she sold the 10-40 bonds several years ago; might have been in 1878, but didn't remember; that her son did the business for her at that time; that she didn't have the 10-40's and the Grand Prize together at the same time; that the eight-thousand-dollar State of Maine 6 % bonds were always in her box; that her impression was that they were in

there in 1878; that she didn't know why there was a pencil mark across that item on the first page of her book; that she didn't know why she only sued for four State of Maine bonds; that she had never disposed of or transferred any of them; that the eight thousand Minneapolis bonds paid 8%; they were in her box in 1878; she never disposed of them or transferred them; that she had two books in the Provident Institution for Savings; she didn't think she took them to Santa Barbara, but didn't remember; didn't remember whether she saw them in 1878; thought she did. One deposit was in her name—three hundred and fifty dollars—and the other, five hundred dollars, was in her son's name; that she must have signed an order to draw out three hundred and fifty dollars; that her impression was that she had it all drawn out and put into Southern Pacific; she remembered going once herself and drawing out a small portion; she supposed that that was from the three hundred and fifty dollar book; she didn't recollect handing the book over to her son, but must have given it to him; that she had an impression it was to be drawn out to be put into something else; that she came back from California in 1877 and lived at 23 Beacon street, in Boston; that in the summer of 1878 she was in the country; that in the summer of 1881 she went to Newport and lived at the Vendome, in Boston, in the winter of 1880 & 1881; that after that she went to Roxbury and her son remained at the Vendome until he was arrested; that he was always a very affectionate boy, and that had continued all the time down to to-day; that he was more demonstrative towards her now than formerly.

On redirect examination she identified two orders for the payment of dividends on the Old Colony stock, dated respectively at Santa Barbara, California, August 20th, 1876, and February 10th, 1877, in favor of Bates Walley, each upon twenty shares; and these
23 orders were put in evidence.

Edward Preble, witness for the plaintiff, testified in chief as follows: I am thirty-three years of age; born April 1st, 1855; went with my mother to Santa Barbara; after received word of the death of Mr. Richardson I started home some time in May or the latter part of April; received the property from George Richardson, the son of Edward; took it and deposited it in the Union Safe Deposit vaults; he gave me a key; I was home but a short time; mother was in feeble health and in July, before returning to California, I went to Bates Walley and asked him to take charge of the property while I was gone and he and I went down to the Union Safe Deposit vaults and opened the tin box and took the envelopes, and on these envelopes was written "The property of Sarah A. Preble;" we took out an envelope at a time, opened it and took out the bonds and cut off the coupons for a year, and then we counted each bond and he made an item and I made an item of it on a piece of paper and we went through the box and all of its contents; upon finishing, he gave me a piece of paper signed "Received from Edward Preble the following-described property;" we exchanged receipts; I gave him one and he gave me another just like it; the one that I signed was destroyed upon my return the following year; Bates

Walley returned it to me and I destroyed it; that was in April, 1877; I left the property in the hands of Bates Walley; he had a key to the box; I had been in his office before this for nearly every day, but not doing business; I don't know what became of the list that I had; I suppose I returned it to him; my mother was very much displeased at the time. After that the first certificate of security was taken out; if I recollect right, some time in the winter of 1879 or 1880. If I recollect right, it was either a Minneapolis or a Chicago bond; one of the two. There was at first a one-thousand-dollar bond taken, if I remember rightly; I have no figures to go by. I had been speculating through the advice of Mr. Walley. I had lost everything I had. They told me that I was in debt to them; Bates Walley told me that I was in debt to them, and he suggested "Why don't you go into the New York market, Ned?" He says, "All you will have to do will be to get one of those Minneapolis bonds and shove it up as margin; you don't have to sell it and we will hold it to make up this balance and pay it back and in that way you will get out of it all whole." I went over alone and took one of the bonds—it was a coupon bond—and brought it over to him; gave it to him; I don't know what he did with it; he said he was going to use it as a margin on some New York stock, if I remember rightly. I suppose the New York stock account was kept in their books; I never saw their books; I never saw the bond again. I took more very rapidly after that; it was probably some more Minneapolis or Chicago; it was as they called for it. I didn't tell my mother of this transaction; she never knew of it; I took out everything there was there. I bought Grand Prize stock at the suggestion of Mr. Walley; I didn't know that it went into the hands of my mother. I used the amount of all mother's securities in transactions with Walley; rarely made anything in speculations; I never speculated in Boston except in the Walley office. At one time in New York, in the spring of 1882, I bought two hundred shares of some stock; "a flyer." My mother's Old Colony stock was changed into Oregon Navigation Company bonds or Eastern Illinois railway bonds. Mother
24 signed the certificate for the transfer of the Old Colony stock. The Oregon bonds didn't go into the safe. I never saw it. I was told it was purchased. I gave the certificate of Old Colony stock to Bates Walley, and he told me he had purchased Oregon Navigation Company bonds with the proceeds of the sale. My mother knew that the stock was to be sold for the purpose of purchasing these bonds. I never told her that I had never seen the bonds or knew anything about them. My mother gave me a power of attorney in 1879 for the purpose of selling United States bonds. With the proceeds of the sale of those bonds I suppose Eastern Illinois Railroad Company 6% bonds were purchased. I never saw the Eastern Illinois bonds. I had spoken to my mother about this transaction before it took place. When I was going to Europe mother gave me the key to go down to the vault to get one of my own bonds, which I placed with Kidder, Peabody & Company to get a letter of credit. When I went to Europe I took the key with me; that was a State

of Maine bond—my own. When I returned, mother having paid my drafts, I took the bond back from Kidder, Peabody & Company and put it in the vault; it afterwards went into Bates & Walley's hands. Some time in 1879 my mother told me there was a sum deposited in the Providence Institution for Savings by her, in my name; that and the money standing in her name in that institution was drawn out for the purpose of purchasing some Old Colony stock, ten shares, and, at Mr. Walley's suggestion, the certificate was made out in my name. He said it would be more convenient to have it done so. The State of Maine bonds were coupon bonds; my name was written on them—on the side of them. On some of the bonds that were coupon bonds there was written across the face of the bonds "property of Sarah A. Preble."

On cross-examination he testified that on the bonds that belonged to his mother, on the face of them, was written "the property of Sarah A. Preble," on many of them; on the Central Pacific Railroad bond; to the best of my recollection, the Chicago Sewerage bonds. I have a recollection on the subject; it was written on all of them—on five—and on no others that I can swear to. On one Central Pacific Railroad and five Chicago Sewerage bonds, each being a coupon bond and payable to bearer, the name of my mother was written across the face, the words "the property of Sarah A. Preble" written in ink. I gave the Central Pacific Railroad bond to Bates & Walley; have no recollection what I told them to do with it; it was some time between 1880 and 1881. I gave the Chicago Sewerage bonds to Bates & Walley; they were used for speculative purposes. I think they were sold for my account. I directed them to be sold at the time I delivered them. I didn't call their attention to the fact that the words I have testified about were written across their face. I began to speculate in stocks in 1877 or 1878, before I went to Europe, in the office of Bates & Walley; if I recollect right, it was either Consolidated Virginia or Grand Prize that I bought. I paid for it with my own money. I paid money; it was the product of the sale of some of my State of Maine bonds; they were my bonds with my name on them; they were payable to bearer, transferable without endorsement. I didn't endorse them; those bonds had my name on them, on the side and on the envelopes also; on the side of the bond, written in ink, the words "property of Edward Preble" and the words "Sarah A. Preble, guardian," if I recollect right.
25 Whether the last words were on the bonds or on the envelopes I am not sure. There were eighty-five hundred dollars of them in all. I went to Europe in February, 1878, and returned in June, 1878. I was then twenty-three years of age. I kept my securities in the Union Safe Deposit vaults in the same box that my mother had. My property was eighty-five hundred dollars State of Maine bonds, and that was all. I began speculating again in 1879, in the fall. For the last year and a half I have been a clerk in the law office of L. C. Southard. I had the key to the box when I was sent down by mother to cut off the coupons. That was so at first. If I recollect right, I ceased to return it to her some time in 1879 or 1880 or 1881. I feel sure that I returned it to her in 1879. I got

it from her in 1879, when I went and took the Minneapolis bond belonging to her out of the box. I applied to her for that purpose, but didn't state to her the purpose. I didn't use it for any other purpose at that time except to take her bond. I think it was in the fall of 1879. Up to that time I was in the habit of turning over to mother all the income upon her securities or its equivalent. Before I went to Europe I bought and sold Consolidated Virginia and Sierre Nevada stock. This was before I took the Minneapolis bond. I remember it, because I had not begun to use her property; don't recall buying New York & New England 7's. I took a thousand-dollar Minneapolis bond of my mother's, and can't tell what I took next, whether Minneapolis or a Chicago or a Central Pacific; can't tell the order in which I made the taking; purchased ten shares of Old Colony stock in January, 1879, and sold it in March, 1880. A dividend was paid on it in January, 1880. The twenty shares of Old Colony stock standing in mother's name were endorsed by her, and with the proceeds Eastern Illinois or Oregon Navigation Company was purchased. I don't recollect which. They were purchased because Mr. Walley told me that they couldn't hold the stock against my indebtedness, but could hold a bond. I didn't keep any accounts of my own. Bates & Walley gave me some accounts. My accounts with them terminated some time in 1882—a month or two before I was arrested and put in jail. I was arrested the 30th day of August, 1882. I visited the office of F. H. Prince & Company, brokers, and watched the ticker; talked over investments, purchases, and sales. This was mostly in the year 1882. I never did any speculating with Hatch & Kendall in New York except the "flyer" I have testified about. All my speculations were done with Bates & Walley. At the time I took my mother's first bond I don't know whether I was indebted to them or not. I was told I was indebted, but not the extent of it. I was told that I was in debt by Mr. Walley in his office. Nobody else was present. I cannot fix the date, except it was in the fall of 1879. At that time, to the best of my recollection, my Maine 6% bonds were all there. Mr. Walley then informed me that I was in debt to his firm. I told him that my money was all gone. He said, "Why don't you try the New York market?" I said, "I have no money." He said, "All that you have to do is to go over and get a Minneapolis bond and bring it over here and we will put it up as margin, and we will make the indebtedness up, and then the bond will come back and you can put it back in the safe." That is the whole of what was said to me. I am using the words he used. At that time I had disposed of the Maine 6's. Nearly everything went through the office of Bates & Walley. I had disposed of the Maine 6% bonds, all
26 of them through the office of Bates & Walley. I swear to that. I can't state the time that I disposed of them; I have no account of it. When I went and requested my mother to give me the key to the box I didn't communicate to her the fact that I was pressed for money; couldn't tell why I didn't. I didn't know how much the debt was; had no idea how much it was; don't know whether the time was an irregular one for me to take the key; don't

remember whether any dividends or interest were due at the time I went over to get the Minneapolis bond. To the best of my recollection, I hadn't taken any Minneapolis bond to Bates & Walley before the fall of 1879. I had no conversation with Mr. Bates — Walley on the subject of taking one before the fall of 1879, that I know of. I didn't, to my recollection, begin to pilfer from my mother before that time. I was never the owner of a Minneapolis bond myself. In November, 1877, I was not engaged in stock operations. I may have bought some things for my mother. The bond which I took in 1879 was a Minneapolis or Chicago or a Central Pacific— one of the three. I had a bank account in 1879 in the National Exchange bank. I don't remember selling four thousand Maine 6's in the fall of 1879. I don't remember purchasing any New York & New England 7's. I think there were some New York & New England 7's in the account somewhere, but I don't remember when and where. Check of H. M. Bates & Walley, dated November 14th, 1879, for two hundred and thirteen dollars and fifty-eight cents, payable to the order of Edward Preble, has my endorsement on it. I couldn't tell what the transaction was for which that check was given. I couldn't say whether I sold two thousand New York & New England bonds at that time or not. I don't recollect whether I paid that sum to my mother; haven't any recollection. Check of March 13th, 1880, drawn by H. M. Bates & Walley in favor of Edward Preble for eleven hundred and twelve dollars and fifty cents, bears my endorsement; don't recollect whether that was the proceeds of the ten shares of Old Colony stock or not. I remember giving orders to have it sold; don't remember receiving the proceeds. I misrepresented to my mother that I was making a great deal of money out of speculations when she told me that I was living too expensively. I can't swear what I did with the money which was paid me from time to time by Bates & Walley. I knew at the time that my mother's suit was brought in the State court against these defendants. I had an interview with her counsel. I suppose I told them what I knew about the transaction. I communicated with Senator Wadleigh and a Mr. Robert Clapp. I don't remember whether I told them the story of the conversation with Bates — Walley in the fall of 1879 in reference to getting one of the Minneapolis bonds. The conversations must have been some time in 1882 or 1883. It was probable that I told them about my transactions with Mr. Walley more than once. There was a suit brought for me in the State court against Bates & Walley. I believe it is still pending. In that suit I did not, to the best of my recollection, claim to be the owner of the Minneapolis 8% bond of the value of one thousand dollars, concerning which I have testified here. I never claimed to be the owner of an Oregon war loan bond of the value of five hundred dollars. I think I purchased some Grand Prize stock and delivered it to my mother some time during the year 1877, 1878, or 1879. I purchased it through the office of Bates & Walley. That was after our return from California. I
27 couldn't tell with what money that was purchased. I think there was fifty shares bought. In some of those years I pur-

chased twenty-five shares of Consolidated Virginia for her and delivered the certificate to her. I believe that Bates & Walley had it subsequently. I believe it was given to them by me, and that I purloined it from my mother's box because they were claiming money from me. These certificates stood in the name of some one as trustee, and were usually endorsed in blank so as to transfer them. My mother spoke to me of my extravagant living in 1880 or 1881; at that time she was receiving what she supposed to be the dividends. I was paying her and representing to her that they were the dividends on her property. When the coupons became due I paid her an amount equal to them, although I didn't receive it. I got the money from my bank account. Whenever she asked for any money I would give it to her; this continued down to the first part of 1882, I think. All through 1881 I continued to pay her the equivalent of the dividends on this whole property. I made her believe that I had received the money or cut off the coupons; that was not true. The transfer of the Old Colony Railroad stock was done with her full consent; she signed and endorsed the certificate. I paid her subsequently what she supposed to be the dividends on the Eastern Illinois bond, and I received the money for that purpose from what I made through Bates & Walley. I didn't receive money from any other source during those years. I received the money from the Oregon Navigation Company bonds and the Eastern Illinois bonds; at least they said so, and I paid that money over to my mother, and know of no false representation on my part with relation to that. I think the United States bonds were sold some time in 1881 or 1882; both the Eastern Illinois and the Oregon Navigation bonds. I suppose I directed Bates & Walley to sell the seven thousand Minneapolis bonds; that was some time in the year 1880, 1881, or 1882. I don't know whether I ever spoke to Mr. Bates, the senior member of the firm, on the subject of disposing of these stocks and bonds; Mr. Walley was usually the one with whom I had conversation. I never called Mr. Bates's attention to the fact that it was my mother's and not my own. I had no other conversation with Bates — Walley or with Mr. Bates in relation to taking the property of my mother from her box, except what I have already testified to in this case, that I recollect of. I communicated to no person, to my recollection, in 1880 or 1881 or 1882, before the time when I was arrested, that I was taking from my mother's box, without her knowledge and consent, her property and disposing of it on my own account. In 1882 I was arrested and charged with embezzlement; New York parties came on here and made the charge.

On redirect examination the witness testified that he received no considerable sum from Bates & Walley that he didn't get by checks; that the Grand Prize certificate which he gave to his mother went into the box, and was taken out some time or other; it had been taken out before 1882. "I speculated in Grand Prize stock. I didn't know that Mr. Walley went to see my mother when I was arrested. I heard of it afterwards. I was charged with embezzlement and the case was never tried. In trading in the stocks I acted about half on my own responsibility and half on the advice of Bates & Walley;

sometimes they would suggest that this would be a good thing and some of the other times I would buy it myself. The writ-
28 ing on my mother's securities, 'the property of Sarah A. Preble,' was in the handwriting of Edward Richardson, who had charge of the property. I never informed my mother in any way that I was using her property for my own speculation; I never paid my mother any of the money that I received from speculations other than paying her board and expenses. Mr. Walley had a horse and buggy and used to take me out to drive. Mr. Walley called at my mother's house with me; he never spoke to her in my presence about business that I recollect. When they asked for bonds, after the first one, I went right across State street to the vault and brought them back. The writing on the envelopes was very plainly written in a large round business hand. In the cases where my mother endorsed the certificate for the purpose of changing investments the securities were never received from Bates & Walley; I never received them in my hands, and she never received them in here, and they never were placed in the vault; I took out all the bonds that were in the box. I always considered that the State of Maine bonds were my property; I didn't tell my mother what I had done with them."

On cross-examination the witness testified that "very probably at some time I might have gone across State street and got the bonds from my mother's safe without having been requested to do so by anybody; but I couldn't tell what securities I went and got on my own account for sale. I don't know what was the aggregate amount of the checks which I received from time to time from Bates & Walley. The nine thousand dollars of checks shown me probably was all that was paid, but I have no knowledge whether those checks represent the whole amount or not. I hired a carriage for my mother to ride in when we were living at Newport."

The defendants called as a witness GEORGE B. MELENEY, who testified that he was in the employ of the defendants from January 1st, 1879, to March 1st, 1883, as general book-keeper; that he entered the transactions in their books; he had the original entries of the accounts of Edward Preble with the defendants; that he kept the books in the regular course of business, and the entries upon the Preble account was in the regular course of business; that the books showed transactions before he was book-keeper; that he rendered transcripts of the accounts from time to time to Edward Preble, usually once a month—sometimes not so often and sometimes oftener, if requested. He produced the ledger covering the years 1875 to 1882, inclusive. He produced the purchase and sales books, showing purchases and sales made in the years 1877 to 1882, inclusive. He produced the cash book covering the same years, and several bill books, showing letter-press copies of accounts, which he testified were in his handwriting, and sent to Edward Preble. The witness testified from each of these books, and said books were admitted in evidence and went to the jury.

He testified that the first entry of a transaction between Edward Preble and the defendants was under date of November 6th, 1877,

which appeared on the purchase and sales book as a sale of one thousand-dollar Minneapolis 8% bond and a purchase of thirty-five shares of Consolidated Virginia stock; that this also ap-
29 peared on the bill book, and showed a check to Edward Preble's order for the balance between the two transactions of seventy-three dollars and seventy-five cents; that this transaction was settled at the time and did not appear on the ledger; that there were no accounts on the books with Edward Preble after August 19th, 1882; that after November 6th, 1877, there was no entry of any receipt or sale of a single Minneapolis thousand-dollar bond upon any of the accounts.

The defendants introduced evidence tending to show that the only transactions which they had with Edward Preble in the years 1877 and 1878 were the sale of a 10-40 United States $500 bond and the purchase of fifty shares of Grand Prize mining stock with the proceeds, which took place in December, 1877, and January, 1878, and the sale of a $1,000 Minneapolis 8 % bond and the purchase of thirty-five shares of Consolidated Virginia mining stock, which took place in November, 1877; that in 1879, in January, they bought ten shares of Old Colony railroad stock for and on account of Edward Preble, which they delivered to him; that in September, 1879, they bought a hundred shares of Sierra Nevada mining stock, for which he paid them cash, amounting to upwards of four thousand dollars; that on or about October, 13, 1879, they sold $4,000 Maine 6 % bonds for him, and with the proceeds purchased $4,000 New York & New England Railroad 7 % bonds, numbered 2196, 2197, 2198, and 2199, and gave him a check for two hundred and thirteen dollars and fifty-six cents ($213.56) as the balance of that transaction; that on or about October 31st, 1879, they sold for him $2,000 New York & New England Railroad 7 % bonds, numbered 3115 and 4059, and bought with the proceeds thereof fifty shares of Ophir Mining Company, and paid to him a check for two hundred and seventy dollars and sixty-seven cents as the balance of that transaction.

That the $4,000 New York & New England Railroad 7 % bonds in the transaction of October 13th, 1879, were delivered to Edward Preble and taken away by him and bore different numbers, and were not the same bonds as those which were sold for him in the transaction of October 31st; that they never received or sold for him any other New York & New England railroad 7 % bonds, and that they received no Minneapolis bond and no Chicago sewerage bond from him in the year 1879; that in the year 1880, on or about the 12th day of April, they received from said Edward Preble $4,000 Chicago sewerage 7 % bonds, numbered 1439, 1440, 1441, and 1445 respectively, and sold the same to Brewster, Basset & Company, dealers in bonds in said Boston; that on or about the 30th day of April said Edward Preble sold $1,000 Chicago sewerage 7 % bond, numbered 1368, to Brewster, Basset & Company, for which said Brewster, Basset & Company paid him cash. Said Brewster, Basset & Company subsequently sold the said $4,000 Chicago sewerage bonds which they received from the defendants to one Benjamin

W. Gilbert, a broker, who bought them for a customer of his. The defendants also produced evidence tending to show that if said Chicago sewerage bonds bore upon their face the words "the property of Sarah A. Preble" they would not be negotiable in the market.

The defendants also produced evidence tending to show that they received $7,000 Minneapolis 8 % bonds in the summer of 1880 from said Edward Preble as collateral to his indebtedness to them upon open account, and held them as such collateral and sold them by his direction on the 5th of July, 1881; that in October, 1880, they bought $3,000 Oregon Navigation 6 % bonds for him, and held them as collateral to his open account with them until September and October, 1881, when they sold the same by his order and applied the proceeds to the settlement of his account.

That by direction of said Edward Preble they gave orders to their New York correspondents to buy in the State of New York $2,000 Chicago and Eastern Illinois 6 % bonds in November, 1880; that the same were never received by the defendants, but only the account of the purchase thereof from their New York correspondents, and that they directed that they should be sold by the order of Edward Preble, in September, 1881, and credited the amount of such sale to his account; that they rendered said Edward Preble an account in December, 1880, showing that they had on hand for him $7,000 Minneapolis 8 % bonds, $2,000 Chicago & Eastern Illinois 6 % bonds, $3,000 Oregon Navigation Company 6 % bonds, six hundred shares of Sierra Nevada stock, fifty shares of Grand Prize stock, and one hundred shares Lake Shore railroad stock.

That on or about March 13th, 1880, they sold for or on account of Edward Preble ten shares of Old Colony railroad stock standing in his name for eleven hundred and twelve dollars and fifty cents ($1,112.50) and gave him a check for that sum; that Edward Preble bought and sold stocks and bonds elsewhere than in their office during the years 1879 to 1881, inclusive; that on the 8th day of September, 1879, Edward Preble sold to Brewster, Basset & Company $4,000 State of Maine 6 % bonds, for which said Brewster, Basset & Company paid him their check of four thousand six hundred and fourteen dollars and sixty-seven cents ($4,614.67).

Isaac C. Bates Walley, one of the defendants, testified that he was thirty-eight years old; knew Edward Preble; knew him before he went to California; knew of his going in 1875 or 1876. "I then had a key to box in the safe*ty* deposit vault;" that he had no recollection of going to the vault during the absence of Edward Preble in California; that he had no recollection that the coupons were cut off from any securities; no recollection of any list of securities being made out or of examining them in any way; that he thought he never had seen the inside of the Preble box in the safe deposit vaults; never saw any envelopes which were in that box; that the first transaction that he had with Edward Preble was in November, 1877; that was a purchase of Consolidated Virginia and the sale of a $1,000 Minneapolis bond; that the first of September, 1879, there was no indebtedness from Edward Preble to Bates

& Walley; that he didn't tell Edward Preble in the fall of 1879 that he was indebted to the firm of Bates & Walley; that he didn't tell him or advise him in any way to get a Minneapolis or any other bond and bring it in to the firm; that Edward Preble did not bring to the firm of Bates & Walley in the fall of 1879 any Minneapolis bond; that a $1,000 Minneapolis bond was brought by Edward Preble and sold by the firm at his request in 1877, and that in 1880 he brought in $7,000 Minneapolis bonds for sale together. The numbers of them were 252 to 258, inclusive; that he had no knowledge that any of the Minneapolis bonds were the property of any other person than Edward Preble; that Edward Preble made no representations as to who was the owner, but simply brought them
31 in for sale; that in 1880, in November, twenty shares of Old Colony railroad stock, the certificate of which stood in the name of Sarah A. Preble and which were endorsed by her, were brought to the firm of Bates & Walley by Edward Preble and by him directed to be sold and the proceeds invested in Chicago & Eastern Illinois 6% bonds; that at that time there were no instructions given by Edward Preble that the purchase of Chicago & Eastern Illinois 6% bonds was to be for his mother; that he bought and sold for Edward Preble $3,000 Oregon Navigation 6% bonds in October, 1880, and that those were bought in New York and never came to Boston; that he never saw them; that they were subsequently sold by Edward Preble's direction, and that no instructions were given either at the time of purchase or the time of sale by Edward Preble except to buy them and to sell them for his account; that the firm of Bates & Walley received $4,000 Chicago 7% bonds in April, 1880, numbers 1439, 1440, 1441, and 1445; that they never had any other Chicago 7% bonds from Edward Preble; that these bonds were sold to Brewster, Basset & Company by the defendants; that Edward Preble brought in to the defendants $2,000 New York & New England 7% bonds, numbers 3115 and 4059, in October, 1879, and they were sold by the defendants on Edward Preble's account; he never received any United States 6% five-hundred-dollar bonds from Edward Preble or from Mrs. Preble; that he didn't know of any money being drawn from the Provident Institution for Savings and paid to the defendants; that he learned of Edward Preble's arrest in 1882; that Edward Preble sent a letter to his office asking him to come and see him; that he went and saw him in the Tombs, in the basement of the court-house, and asked him what the trouble was; Preble said he was arrested for a draft for $2,000; that the money to meet it was in the box in the vault, and afterwards he said the money was at his mother's; I said I would go and see his mother for him; I went out and saw her in Roxbury; I told her about his trouble; that he was arrested for $2,000, and that he said the money was in the vault or out there in Roxbury at the house; she said that she knew nothing about it; the conversation was wholly about the $2,000 for which he was arrested; that nothing was said about her property in the vaults and nothing was said about any Minneapolis or Chicago bonds or any of her property, or that it was all gone; that he learned from

Edward Preble in 1879, 1880, and 1881 that he was speculating in New York and California in other houses; that he know of his being in California; that Edward Preble told him that he bought and sold stocks while there; that he told him he had operated in stocks in New York; spoke about buying Manhattan elevated railroad stock; that he never made a demand upon Edward Preble to put up collateral against his indebtedness; that he never purchased for him or his mother any Southern Pacific railroad bonds.

On cross-examination he testified that he first met Edward Preble about fourteen years ago; he knew him in 1874; that he met him at the house of a friend and subsequently he was friends with him down to 1882; that they went to the White mountains together; that they went to Fayal, on one of the Azores, in the same ship and came back with him; that he knew he had a mother; that he called at her house; he had no recollection that he ever spoke to him about his mother's property, or any part of it; had no
32 recollection that he ever showed him any of his mother's property or any that witness had reason to believe was his mother's; that the Old Colony railroad certificate for twenty shares stood in his mother's name and was transferred by her to him, and that he never at that time thought about the ownership of it; that he collected dividends in 1876 upon twenty shares of Old Colony railroad stock upon orders from Mrs. Preble sent to him from California by her; that he never thought that any of the stocks or bonds which were brought him by Edward Preble belonged to his mother; that he supposed Edward Preble was arrested on a criminal charge, though he didn't know; he never did any business for Mrs. Preble or dealt in any property which he thought belonged to her; that the first transaction that he ever had with Edward Preble was in 1877, in November, which was the sale of $1,000 Minneapolis bond and the purchase of Consolidated Virginia stock; the next transaction was a sale of a 10-40 United States bond and the purchase of Grand Prize stock with the proceeds; that to the best of his knowledge he never had any other United States bonds from Edward Preble nor sold any for him; that "in 1876 he gave me the key to his box in the Union Safe Deposit vaults and I didn't know whether it was full of shavings or not."

Henry M. Bates, the other defendant, testified that he knew that Edward Preble was doing business with the firm; that he knew of $7,000 Minneapolis bonds being held as security to Edward Preble's account; that he did business in the brokers' board and was there almost all day and not in the office; that he had never had any information that Mrs. Preble was the owner of the bonds or stocks in which Edward Preble was dealing; never had any transactions with her and never had any conversations with Edward Preble upon the subject; that in 1881 or 1882 Edward Preble showed him a certificate of some smelting stock which he said he had bought in New York upon which he said he could double his money.

On cross-examination he testified that the first intimation, information, or knowledge he had that the securities sued for were or were claimed to be the property of Mrs. Preble was when he re-

ceived a letter from her counsel just before the suit was brought, and that none of the securities sued for were now in his possession.

The plaintiff was called in rebuttal and testified that when she went to her box in 1878 she examined the bonds separately and found everything safe then; some of the envelopes had been worn out; that she got some new envelopes and put some of her securities into them; she thought she put her Chicago bonds into her new envelopes; she produced a piece of an envelope which she said was one of the ones she took home with her in 1882 from the box; the writing on it was her writing; the piece of envelope had written on it "City of Chicago sewerage bonds," with the numbers. The witness testified "I think my name was on the part that is torn off."

On cross-examination she testified that she loaned at one time one $1,000 Minneapolis bond to her son Edward; she didn't know for what purpose, he didn't state the purpose; that she didn't remember ever having denied any request that her son ever
33 had made her; that she thought she loaned the one $1,000 Minneapolis bond to her son before she went to Santa Barbara; that when she looked in the vault in the summer of 1878 the eight Minneapolis bonds were all there; she testified that the entries in her memorandum book were not reliable; that she could not tell when she made the entries upon them or when the figures were set down; that she couldn't tell why she made the entries nor why she had struck out any of them.

Isaac C. Bates Walley, being recalled, testified that he never advised Edward Preble to erase any writing from any bond, and didn't advise him to erase any writing from a $500 United States bond, and that he had never heard of such a thing until the testimony of Edward Preble in this case.

The foregoing was all the evidence in the case material to these exceptions.

The defendants asked the court to rule and instruct the jury as follows:

1. Upon the evidence in this case the plaintiff cannot recover upon any transactions which were had between the defendants and her son before January 25th, 1881.

2. If the jury find upon the evidence that the defendants received from Edward Preble one Minneapolis 8 % bond, of the par value of one thousand dollars, in November, 1877, and sold the same to Hawes & Henshaw in that month, the plaintiff cannot recover for its value in this action.

3. If the jury find upon the evidence that the defendants, in the year 1880, converted to their own use seven Minneapolis 8 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, and applied them as collateral to Edward Preble's indebtedness to them, the plaintiff cannot recover damages for the conversion of such bonds in this action.

4. If the jury find upon the evidence that the defendants, in the year 1880, converted to their own use two Eastern Illinois 6 % bonds, of the par value of one thousand dollars each, the property of the

plaintiff, the plaintiff cannot recover for the conversion of such bonds in this action.

5. If the jury find upon the evidence that the defendants converted to their own use three Oregon Navigation Company 6 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff cannot recover for the conversion of such bonds.

6. Upon the evidence in this case, the plaintiff never became the owner of the three Oregon Navigation Company 6's, specified under item 3 of the first count of her declaration, and the defendants cannot be held liable therefor in this action.

7. If the jury find upon the evidence that the defendants purchased in New York in 1880 three Oregon Navigation Company 6 % bonds by the direction and for the account of Edward Preble, and that those bonds were never received by the defendants, but remained in New York in the hands of the correspondents of the defendants and were sold by the order of Edward Preble in 1881,
34 without notice to the defendants, either at the time of the purchase or of the sale, that the plaintiff had any interest in the transaction, there was no conversion of those bonds, and the plaintiff cannot recover therefor in this action.

8. If the jury find upon the evidence that the defendants in April, 1880, converted to their own use four Chicago sewerage 7 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff cannot recover for such conversion in this action.

9. If the defendants received from Edward Preble four Chicago sewerage bonds, of the par value of one thousand dollars each, with instructions to sell the same for him and thereupon the defendants did sell the same and turned over the proceeds of such sale to Edward Preble after deducting their commissions, the plaintiff cannot recover in this action, although she was the owner at that time of such bonds, unless she proves that the defendants acted in bad faith and knew that the plaintiff was the owner of those particular bonds.

10. The plaintiff cannot recover in this action for any Chicago sewerage bond which was sold by Edward Preble to Brewster, Basset & Company.

11. If the jury shall find from the evidence that in October, 1879, the defendants wrongfully converted to their own use four New York & New England 7 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff cannot recover for such conversion in this action.

12. If the defendants in October, 1879, purchased for the account of Edward Preble and by his direction four New York & New England 7 % bonds, of the par value of one thousand dollars each, and delivered said bonds to said Edward Preble, the defendants are not liable in this action therefor.

13. Upon the evidence in this case the plaintiff is not entitled to recover for the conversion of five New York & New England 7 % bonds, of the par value of one thousand dollars each, as stated in

item 5 of the first count of her declaration, nor for the conversion of any of them.

14. The burden of proof is on the plaintiff in this case to show by a preponderance of the evidence as to each cause of action upon which she relies that it accrued within six years before the date of the writ in this case.

15. There is no evidence in this case upon which the jury would be authorized to find that there was any fraudulent concealment by the defendants from the plaintiff of any of the causes of action upon which this suit is brought.

But the court refused to give each or any of said rulings; to which refusals the defendants excepted; and the court ruled and instructed the jury, as far as is material to these exceptions, as follows:

Now, gentlemen, the claim of the plaintiff, in a word, is this, upon the evidence: That her son, in connection with the defendant Walley or with his knowledge, at least, either prior or subsequent to the boy's taking the securities, took all the securities, not all at a time, but gradually from 1877 down to July, 1882, from that safe to the office of these defendants here to use for the purposes of specu-
35 lation, and that they were lost in speculation. Now, the plaintiff claims, in other words, that this defendant firm is guilty, because they had the knowledge to whom this property belonged, of converting it to their own use or of wrongfully taking these securities and converting them to their own use; that, though the son may be guilty of taking the property, *that* the defendants also had sufficient knowledge—sufficient in law—to charge them with such an action, so that they are liable to be sued in this form of action—in trover.

Now, gentlemen, the defendants, in answer to that charge, say, in a word, "No, you are not, upon the evidence, to believe what Mrs. Preble claims. We claim, upon the evidence, that you should find, and that is our position in this case, that we took these securities in good faith; that we are a firm of brokers, established for a number of years in the city of Boston and of good reputation, doing a regular business as brokers, and that the securities came to us in the course of our business, and that they were negotiable securities—that is, such as are dealt in and pass by delivery—and that we had no sufficient knowledge as to the ownership—the actual ownership—of those bonds as to charge us in this action."

Well, gentlemen, those are the two positions of the parties in this case. Now, you have heard the evidence. What must the plaintiff prove? What must Mrs. Preble make out here? The statement of her case is contained in the declaration in this paper which you will have with you, which is comprised of fifteen different items of property, principally bonds. Now, it is necessary, in the first place, for the plaintiff, upon the evidence, to show that she was entitled to this property or such portions of it as may have gone into the hands of the defendant; that she, if you please, was the owner of it and entitled to it; and so I should say to you that when you look at

this declaration in your jury-room it might be well for you to take up one item after another contained in this first count and determine, upon the evidence, whether, at the time of the taking by the defendants, if they did take it, the property was the property of Mrs. Preble, because that is the foundation of her case.

Finding, if you do, upon the evidence, that this property consisted of negotiable securities, what is the law with respect to the notice that these defendants must have in order to charge them in this form of action? How far, as a matter of law, must the defendants, the brokers in this case, have had knowledge that these securities did not belong to the son, but did belong to the mother?

"Negotiable promises for the payment of money, payable to bearer and transferable by mere delivery without assignment or endorsement before their maturity, are protected by the law, and a purchaser for value or an agent who in good faith receives them for sale is not liable to the true owner from whom they have been stolen unless such purchaser or agent had guilty knowledge that the person from whom he received such securities was not the true owner of them."

In this case in respect to each particular security sued for the plaintiff must satisfy the jury that the defendants received that security and dealt with it in bad faith. It is not enough for the plaintiff to prove that the defendants had knowledge of circumstances that might excite suspicion of a defect of the title of Edward Preble, nor that they were guilty of gross negligence in the
36 transaction, but in order to recover in this action the plaintiff must prove bad faith, which implies guilty knowledge or that there was wilful ignorance on the part of the defendants.

That is, gentlemen, it is not sufficient that there were suspicious circumstances connected with the taking of these bonds by the defendants, but you must believe, upon the evidence, that the defendant Walley was guilty of bad faith in the transaction, or that he had knowledge, as a matter of fact, of the transaction—guilty knowledge of it. So that, gentlemen, fundamental in this case you must determine, upon the evidence, whether at the time or during the time these securities passed through the hands of Edward Preble into the hands of the defendants the defendant Walley had knowledge to whom they belonged, or, in other words, was guilty of bad faith in taking them from the young man, having knowledge that they belonged to his mother.

If you determine, gentlemen, upon the evidence, that the circumstances were simply suspicious, then the plaintiff has no cause of action. If you determine, upon the evidence, that the defendant Walley was guilty of bad faith in the transaction, then that proposition you will decide in favor of the plaintiff and she can recover so far as the property which belonged to her at that time is concerned.

But, gentlemen, there is another defence here, set up as to a part of this property, and that is the statute of limitations.

I ought to have said, in the question of the defendants having notice, that if you find, upon the evidence, that these bonds and se-

curities were endorsed "The property of Sarah Preble" at the time that they passed into the hands of the defendants, if any property did so pass, why, then, of course, that would be sufficient notice to them to charge them with knowledge as to who was the actual owner of the property.

Gentlemen, the second defence that is set up here is the statute of limitations—that is, the date of the writ here is January 25, 1887, so that the defendants say here that the statute of limitations had run against all these transactions, which took place more than six years prior to the beginning of this suit, and the defendants say that the plaintiff cannot recover for any transaction which took place prior to January 25, 1881.

The plaintiff in reply says: "We come under an exception to the general statute, an exception which is contained in the statute of Massachusetts, and that is this, that where there is a fraudulent concealment of the transaction, then the statute doesn't begin to run until the party discovers that she has a cause of action." So that the plaintiff says with respect to the transactions which took place prior to January 25, 1881, there was a fraudulent concealment of the cause of action, such a fraudulent concealment that the statute of limitations would not begin to run until Mrs. Preble actually discovered the condition of affairs, which was in 1882, and this action was brought within six years of that time.

Well, gentlemen, what are the facts with respect to the statute of limitations—that is, the general principles which should apply to this case? What is meant, if you please, by "fraudulent concealment"?

Now, gentlemen, I shall charge you, as matter of law, this: That if you believe that the defendants here were not guilty of
37 fraud in these transactions, if you believe that they took these negotiable securities in, if you please, the ordinary course of their business and sold them, then Mrs. Preble would not have a right in this case to bring suit for anything that took place prior to January, 1881; but, on the contrary, if from the evidence you believe that Walley, one of the defendants, conspired with young Preble to obtain these bonds, and afterwards to conceal the fact from the mother, he, Edward, having the key to the safety box containing the securities, this would be evidence going to prove a fraudulent concealment of the cause of action, such as would bring it within the exception of the statute. So that, gentlemen, whether there was fraudulent concealment of the transaction such as would make Mrs. Preble's whole claim good here turns upon the question whether you believe from the evidence which has gone in before you that the defendants here acted in the ordinary course of their business or whether you believe upon the evidence that one of the defendants, Walley, was a co-conspirator with Preble in these transactions, and that young Preble also had the key to his mother's safe, so that, if you please, his mother with great difficulty could obtain access to it or knowledge as to whether those securities existed or not. Those rules of law, gentlemen, you will apply upon the subject of the statute of limitations.

Of course, gentlemen, if you should find that the statute is a good plea here, then you will have to deduct from this count all transactions which took place prior to January 25, 1881.

And while I would not instruct you that you must find upon each separate item, in the nature of a special verdict, yet I might say that it would be a convenience, perhaps, if you would take up each one of these items, provided you find that the defendants are chargeable or liable upon any of them—if you would take them up and note separately the items, if any, where you hold the defendants liable. Therefore, gentlemen, in a word, you see when you retire to your jury-room you must take up the general question as to whether the plaintiff can recover anything. If the plaintiff can recover anything, then you must take up the question as to how far that is affected by the statute of limitations, if it applies.

Now, gentlemen, the burden of proof here is upon the plaintiff. When a person comes into court he must prove, by what is called a preponderance of evidence, the claim which he sets up or else he cannot recover, and that means simply this, gentlemen: Suppose the evidence is equally balanced upon any particular point in this case, suppose you find the evidence equally balanced, why, then, the plaintiff cannot recover; there must be a preponderance, and you will weigh the evidence and determine whether there is that preponderance which is necessary to entitle the plaintiff to recover.

I will also give you the first prayer which the plaintiff requests:

"The court is requested to instruct the jury that if the defendants combined with her son to get possession of the property and convert the same to their own use, which was in her box in the safe deposit vaults, and did so, they are liable in this action for all property so taken by any of the confederates."

The defendants excepted to the several portions of the
38 judge's charge to the jury which were inconsistent with their prayers for instructions heretofore set forth, and excepted to the part of the charge in which the court stated the rule of law with reference to the statute of limitations and with reference to the fraudulent concealment of the causes of action.

The jury returned a verdict in favor of the plaintiff for thirty-four thousand seven hundred and seventy-two dollars and eighty-eight cents ($34,772.88) and returned into court with their verdict an itemization of the items in the plaintiff's declaration upon which they found, with the computations of interest thereon, of which the following is a copy:

$8,000.	Minneapolis 8's	$8,000	
	Premium on same at 115	1,200	
	Int. on same to June, 1882, inc.	1,600	
	Int. on $9,600 from June 1, '82, to Dec. 19, '88	4,691	
1,000.	Eastern Ills. at 94	940	
	Int. after Dec. 1, 1879, to June 1, 1882, at 6 %	150	
	Int. on $1,150 from June 1, '82, to Dec. 19, '88	451	95

$3,000.	Oregon Railway Navigation 6's, at 93	$2,790	
	Int. after Dec. 1, '79, to June 1, 1882, 2½ years, at .06	450	
	Int. from June 1, '82, to Dec. 19, '88	1,355	85
5,000.	Chicago sewerage loan 7's	5,000	
	Premium at 113	650	
	3 years' int. from Jan., 1880, to July, 1882, inc., at 7 %	1,050	
	Int. from July 1, '82, to Dec. 19, '88	2,738	63
2,000.	New York & New England Railroad 7 % bonds	2,000	
	Premium at 109½	190	
	Int. from Jan., 1880, to July, 1882, in 3 years, at 7 %, .21	420	
	Int. from July 1, '82, to Dec. 19, '88	1,095	45
		$34,772	88

The defendants, having duly excepted as aforesaid, and being aggrieved by said admissions and said exclusions of testimony and by said rulings and refusals to rule, present these exceptions to the court and pray that the same may be allowed and made part of the record.

By SAM'L HOAR,
Their Attorney.

Exceptions allowed.

LE BARON B. COLT,
U. S. Circuit Judge.

39 EXHIBIT A. (In ink.) (First page) (first leaf).

1877 to '78 (in pencil).

Valuation of Property.

$4,800 U. S. registered bonds.
$500 U. S. R. bonds.
500 Oregon war loan coupon.
1,000 Central Pacific R. R. coupon.
5,000 Chicago bonds, coupo-.
2,000 Old Colony R. R., 20 shares.
1,500 Grand Trunk R. R., 15 shares.
500 ten-forties, 10-40, U. S. coupon.
8,000 State of Main bonds, coupo-.
8,000 Minneapolis bonds, coupo-.
3,400 mortgage notes, T. C. Lowis.
$350 Provident Savings bank.
500 " "
2,500 house, Stone St., Portland.
1,140 mortgage, Santa Barb.
3,000 15 (shs. G. Prize) (in pencil).
600 15 (Con. Virginia, State of Maine) (in pencil).

1879 my son sold for m- 500 10-40.
Purchased 50 shar- Gr'nd Prize. (Both lines in pencil.)
50,990 value (in 1871) (in pencil).

(In pencil.) (Second leaf, 1st page.)

Valuation, 1879.

2,800	Gov. bonds, 4 p'r cent.	112
2,000	N. Y. & N. England B.	140
1,000	Central Pacific R. R.	60
7,000	Minneapolis bonds	560
5,000	Chicago bonds	350
8,000	State of Maine bonds	(240)
1,500	Grand Trunk R. R.	90
2,000	Old Colony, 20 shares	120
500	Oregon	.30
	Southern Pacific	
3,500	Bedford Sav. bank	214
1,000	Old Colony, 10 shs., Edward	60
5,500	N. Y. & N. England, Edw.	
	Old Colony, Edw.	(30)
2,500	house, Portland	
1,140	Santa Barba.	
36,240		
8,000	Con. Virgin.	
600	Grand Prize	

Falling of gold.

40 (In pencil.) (Second leaf, 2nd page.)

1877. Annual.

5,000	Chicago bonds	350	
1,000	Central Pacific	60	
2,000	N. Y. & N. England	140	
3,500	South'n Pacific	210	
500	Oregon war lo-n	30	
2,800	Gov. 4 per cent. bonds	112	
3,000	Old Colony, 30 shares	180	
7,000	Minneapolis bonds	560	
1,500	Grand Trunk R. R.	90	
2,000	*E* Easter. Ill. sixes	120	
4,000	State of Maine	290	(erased).
2,500	house, Portland		
1,140	Santa Barbara		
31,940	valuation.		

Falling of gold.

(In pencil.) (Third leaf, 1st page.)

1880.

		Sum.	Ann.
Jan.	Chicago bonds	175	
"	Central Pacific, gold	.30	
	7 per ct. N. Y. & N. England	70	
"	Bedford S. bank	100	
"	Oregon	.15	
"	Gov. 4 per cent. bonds	.25	
	Old Colony, 30 shares	90	
	29,800		
Feb.	Minneapolis bonds	280	
	78,800		
	Grand Trunk R. R.	45	
	Interest on G. bonds of 1877, July	144	
April.			
"	N. Y. & N. England	35	
	31,940	3,095	0 6's
	26		
701			
841			
1,542 per y'r.		1,158 gold over.	
	30,940		
	8,5		
	39,440		
41	Oct. Gov.	1,732	
	Oct. N. Y. & —	----	1,672
	10545	1,672	
	310	108	
		177	

(In pencil.) (Third leaf, 2nd page.)

Jan., 1880.

Jan.	Chicago bonds	175
	Central Pacific	30
	N. York & N. England	70
	Oregon W. loan	15
	Gov. 4 p'r c'nt.	28
	Old Colony	60
Feb.	Minneapolis bonds	280
	Grand Trunk R. R.	55
April.	Gov. 4 per ct.	28
	s 701.	
	s Sawyer house.	
May.		731

(In pencil.) (Fourth leaf, 1st page.)

July.

July.	Chicago bonds	175	
"	Central Pacific	30	
"	N. Y. & N. England bond	35	(written over 70).
	Oregon W. loan	15	
	Gov. 4's bonds	28	
	Old Colony	60	
	Old Colony. Edward	30	
	3,507 in bank.		
Aug.	Minneapolis bonds	280	
"	Grand Trunk R. R.	45	
Oct.	N. Y. & N. England	35	(written over 70).
	Gov. 4 p'r cent.	28	
	3,500 Southern Pacific	105	
	$841		
		971	

42 (In pencil.) (Fourth leaf, 2nd page.)

Valuation, 1880.

Transfer to Oregon Navgt.:

2,800	Gov. 4 p'r c'nt. bonds	$112	
		7	per cent.
2,000	N. York & N. England	140	
1,000	Central Pacific	60	
7,000	Minneapolis bonds	560	
5,000	Chicago, 20 shares	350	
1,500	Grand Trunk	90	
2,000	Eastern Ill. sixes, R. R.	120	
2,000	House Portland.		
1,140	Santa Barbara.		
3,500	Southern Pacific	210	Old Col. R. R.
	coup.		
3,000	Oregon Navigation	180	
1,500	Southern Pacific	90	
	32,440		

Edward.

1,000	Minneapolis.	
8,500	State Maine.	
500	Oregon war loan.	
850	Provident S. bank.	
500	Ten-forties 10 40	
		32,440
		10,350
11,850		42,790

(In pencil.) (Fifth leaf, 1st page.)

Semi-annual.

2,800	Gov. 4 bonds	56
2,000	N. Y. & N. E.	70
1,000	Center Pacific	30
7,000	Minneapolis	280
5,000	Chicago	175
1,500	Grand Trunk	45
2,000	Eastern Ill. sixes	60
3,500	Southern Pacific	105
3,000	Oregon Navigation	90
		911 00

Old Colony R. R.

971 semi-an.
2

1822

43 (In pencil.) (Fifth leaf, 2nd page.)

Jan., 1880.

Jan.	Chicago bonds	175
"	Central Pacific	30
"	N. Y. & N. England	70
"	Gov. 4 p'r cent.	28
	Old Colony	60
Feb.	Minneapolis bonds	280
	Grand Trunk	45
Apr.	Gov. 4 p'r cent.	28
May 5	(for April) (in ink).	
	Sawyer rent by F'syth, 1872 (figures	18 in ink).
June 4	(for May) (in ink) Sawyer rent	18
July 9	Sawyer rent, 11th	18 (this line in ink).
	For June (in ink).	
		770 22

(In pencil.) (Sixth leaf, 1st page.)

Jan., 1881.

Jan.	Chicago bonds	175
"	Cent. Pacific bonds	30
"	N. Y. & N. England bonds	75
"	Gov. 4's bonds	28
	Oregon Navigation	90
Feb.	Minneapolis bonds	280
"	Grand Trunk	45
Apr.	Gov. 4	28
	Southern Pacific	105
Jan.	Eastern Ill. sixes	60
		921 (written over 826).

Oregon Navigation bonds.

44 (In pencil.) (Sixth leaf, 2nd page.)

July, 1881.

	July.		
	Oregon Navigation		90
July.	Chicago bonds		175
"	Central Pacific		30
"	N. Y. & N. England		75
	Gov. 4's	398	28
Aug.	Minneapolis bonds		280
	Grand Trunk, Newport		45
Oct.	Gov. 4		28
	Southern Pacific		105
Dec.	Eastern Ill. Express		60
			911

(In pencil.) (Seventh leaf, 1st page.)

(This page is blank except the word "over" and "Jc."

(In pencil.) (Seventh leaf, 2nd page.)

Jan., 1882.

Jan.	Chicago bonds	175	
Jan.	Oregon Navigation	90	
"	Central Pacific	30	
"	N. Y. & N. England	75	
"	Gov. 4	28	
			398
			325
			723

Feb.

Feb.	Minneapolis bonds	280	
"	Grand Trunk R. R.	45	

April.

Apr.	Gov. 4	28	
"	Southern Pacific	105	
	1,500 Southern Pacific G. Int.	45	

June.

June.	Eastern Ill. bonds	60	
			$966
			1,932
			1,932
			1,822

45 (In pencil.) (Eighth leaf, 1st page.)

July, 1882.

July.	Chicago bonds	175
"	Oregon Navigation Co.	90
	Central Pacific	30
	N. York & N. England	75
	Gov. 4	28
		$398

Aug.

Aug.	Minneapolis bonds	280
	Grand Trunk	45

Oct.

Oct.	Gov. 4	28
	Southern Pacific	105
	Southern Pacific G's	75

Dec.

Dec.	Eastern Ill. R. R. (express)	60

(Written over R. R.)

All gone!!!

916

(In pencil.) (Eighth leaf, 2nd page.)

Bear. Beer.

		Borrowed of Mrs. Baker	50
	29.	Bor.	100
		Borrowed Jan. 28	50
Feb.		Loaned by b'nk	50
		On tick	50
March	8.	Mr. Baker, tickets	25
		For pills	.40
March	14.	Tickets	25
"	15.	Mr. Baker	5 cts.
"	16.	2 tickets for s'lf	10
			205

56 5097

		Miss Barker	12 cts.
Mar.	19.	Mrs. Stevens	40 cts.

April 4. One bottle beer.
5. 3 bottles.

46 (In ink.) (Ninth leaf, 1st page.)

Account with T. Forsyth.

1884, hous- rent.

Jan.	19.	Ren. P. O. order rent	28
Feb.	5.	Greenlaw	10
Ma'ch.		"	10
May	8.	E. L. Pendell	10
Ap.	8.	From Forsyth Baxter	20
Jan.	8.	Due May	20
Aug.	16.		10
May	25.	Sanders rented hous-.	
Sept.		Sn. from Forsyth	20

(In pencil.)

4800	2500
5	1140
5	
1000	3000
5	1000
2	
1500	7640
85	31200
3500	
5	3844
31200	8
	2084

(In pencil.) (Ninth leaf, 2nd page.)

1883–1884.

Rent Stone St. House, Fortla.

Collected by C. Marwick.

Oct.	25.	Rent Flanders paid	10
Ap.	27.	Hall paid	10
	Mar.	Rec'd from C. Marwick	14 64 (this line in ink).
47	29		
	Mar.	22. Rec. fr. C. Marwick	10 (this line in ink).
May	13.	Re. fr. Marwick	19
July	11.	For June $10, for water	10
(Aug.		Mrs. Gregge	(10)
(Aug.		Hall for June	(10)

Sawyer. Hall, July, myself 10

Sawyer.

Sept. 9.	Miss Gregge		10
Oct. 9.	Mrs. Gregge		10
Aug. 27.	Hall		10
Nov.	Mr. Gregory		9 (all but Nov. in ink).
	Hall for Sept.	1583	7 (in ink).
Sept.	Hall		10
Dec.	Mrs. Gregory	17 cents, deduct.	10
Oct.	Hall		888
	Mrs. Gregor water bill paid		10
Nov. 24.	Hall		10
		77050	

(In pencil.) (Page marked X. B. F. B.)

2800 transferred.
2000 N. Y. & N. E.
1000 Central Pacific.
8000 Minneapolis bonds.
5000 Chicago.
1500 Grand Trunk.
2000 Eastern Ill. sixes.
2500 House.
1140 Santa B.
3500 Southern Pacific.
3000 Oregon Navigation.
3500 Southern Pacific.
8500 State of Maine.
500 Oregon war loan.
850 Provident S. Bank.
500 10-40.

46290

48 EXHIBIT B.

1864 was living in Cambridge, Mr. Edward Richardson having care of my bonds & other property. Chicago 5,000 bonds purchased by Mr. R. 1868 left for Germany; three years about. On my return visited Lee; deposit with Mr. Richardson frequently.

1875 left for Cal. Bonds still at Lee, deposit care of Mr. E. Richardson, who deceased.

My son returned, taking charge of property in 1876.

* * * * * * *

1877 at Mrs. Rand's. My son off for Europe. I had no occasion

to go to my box, having a full supply of money. 1878 was in all winter. My son attended to all my money affairs.

23

1879 was at Brookline, my son attending to all my business. I had made my will, giving to him, after my decease, all my property. At this time I took no interest in my money affairs, so painful was physical suffering.

At one time during the absence of my son, in 1877 or '8, Mr. Bates Walley collected interest on Old Col. R. R. If I remember correctly, as he handed it to me I expressed my dissatisfaction, the amount not being in full. This was at 40 State St., in the building where his office was. I greatly disliked this man; often warned my son, as he for years shadowed him by night & day; always after him to drive or walk.

June 19, 1883. After one year of agony and distress in body and mind, our Heavenly Father, in His merciful kindness, seems to be opening a way of success for my dear distressed son. Light begins to dawn upon our path. Accept our grateful prayer, O! Father of Love & Mercy!

Deceived in our prospects.

May 13, 1884. No success.

Confucious died 478 yr. before Christ.

It is thereupon considered by the court, to wit, April 5, 1890, that the said Sarah A. Preble, plaintiff, recover of the said Henry M. Bates and I. C. Bates Walley, defendants, the sum of thirty thousand seven hundred and five dollars damages, the said damages being computed as follows:

From the damages found by the jury Dec. 20, 1888	$34,772	88
Deduct the amount remitted by plaintiff	6,276	36
Leaving	$28,496	52
49 And add interest from Dec. 20, 1888, to this date, April 5, 1890, at six per centum per annum	2,208	48
Making	$30,705	00

And her costs of suit, taxed at one hundred and eighty-nine dollars and two cents.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

The following are the opinions of the court in this cause:

Opinion of the Court. (*March* 5, 1889.)

COLT, *J.:*

The defendants in this case filed a motion for a new trial within two days after verdict against them under law rule 26.

At a subsequent date they filed another motion for a new trial asking that the verdict be set aside on the additional ground of newly discovered evidence.

The plaintiff now moves to dismiss these motions on the ground that the first motion was waived by the filing of the subsequent motion, and that the subsequent motion is irregular, because not filed within the time allowed under the rule. I think the defendants preserved their rights under the rule by filing a motion within the two days allowed, and that the second motion so called should be construed to be in amendment of or in addition to the first motion rather than a distinct motion for a new trial. It would be going too far, perhaps, to say that a party must set out within the limited time specified by the rule all the grounds upon which he bases his motion. He may not, with the utmost diligence, be able to discover within two days every ground he can fairly take. For example, in this case, as I understand it, the alleged newly discovered evidence did not come to the knowledge of defendants' counsel until some days after the expiration of the time allowed by the rule. The rule should receive a reasonable construction, and provided a party has filed his motion for a new trial within the two days, setting out his reasons in the light of the knowledge he then possesses, he should not be deprived of the right of bringing forward additional grounds which he could not have known at the time because the facts were not within his knowledge. I do not think, therefore, that either of the defendants' motions should be dismissed, but that they should be allowed to stand as one motion.

The plaintiff also moves that the bill of exceptions to be tendered by the defendants be not signed, on the ground that the filing of the motion for a new trial constitutes a waiver of their bill of exceptions. I do not understand that the mere filing of a motion for a new trial is a waiver of the right to a bill of exceptions. The most that can be said is, under the decision of Judge Story, in Cunningham *v.* Bell, 5 Mason, 173, that the court will require the party to elect whether he will proceed to a hearing on his motion or, waiving that, proceed upon his writ of error to the Supreme Court. The scope of Judge Story's decision is this: that where a party means to apply to the appellate court for a final decision of the law of the case he should do so without delay, and that he should not be permitted to argue the same question before the lower court.

This seems to be most convenient for the due administration of justice.

But I think this rule should be subject to this qualification: that while a party has no right to bring forward in a motion for a new trial any legal question which could properly be embodied in a bill of exceptions, he should not be deprived of the right of presenting to the court in the form of a motion for a new trial questions which cannot properly be made a part of a bill of exceptions, such as that the verdict is against the weight of evidence or that the party is entitled to a new trial on the ground of the discovery of new evidence. To hold otherwise would be to deprive a defeated party of taking advantage of all of his legal remedies.

Where a verdict is given against the weight of evidence or where new evidence has been discovered, the remedy of a party is by

motion for a new trial. He has no remedy in a court of error. Such a motion is addressed largely to the discretion of the court and its decision is not reviewable by the appellate court.

Mulhall *v.* Keenan, 18 Wall., 342.
The City *v.* Babcock, 3 Wall., 240.

The Supreme Court have held that in the absence of a rule to the contrary a motion for a new trial was not a waiver of a writ of error.

United States *v.* Dashiel, 4 Wall., 182.
United States *v.* Hoge, 6 How., 279.

In this circuit there is no rule of court on this subject. The plaintiff relies upon the language of Judge Story in Cunningham *v.* Bell, but I do not think that language should receive the broad interpretation contended for. In Marine City Stave Co. *v.* Herreshoff Manufacturing Co., 32 Federal Reporter, 822, the facts were quite different. In that case the court found an express waiver of the exceptions.

I am of opinion that under the law of this circuit a party should not be allowed to be heard on a motion for a new trial embracing the same questions of law which are embodied or could probably be embodied in his bill of exceptions, and that under these circumstances the motion for a new trial will not be heard unless he consents to waive his exceptions. At the same time I think a party should be heard on a motion for a new trial which is confined to such questions as could not be properly embraced in his bill of exceptions without waiving his right to a writ of error. In the present case I shall allow the defendants to be heard on their
51 motion for a new trial if limited to questions which could not properly be raised in their bill of exceptions. The plaintiff's motions in this case are overruled, and the defendants may have leave to amend their motion for a new trial.

Opinion of the Court. (*August* 23, 1889.)

COLT, *J.:*

The principal ground relied upon by the defendants in this motion for a new trial is newly discovered evidence. At the trial Edward Preble swore that on many of the bonds belonging to his mother there was written across the face of them "the property of Sarah A. Preble," and that he had a recollection that it was written across the face of the five $1,000 Chicago sewerage bonds, which were a part of the property in controversy. To meet this, the defendants called numerous witnesses who testified that such bonds would not be a good delivery in open market. The court charged the jury in substance that if the bonds received by the defendants were so marked they would be charged with notice, and consequently that they would be liable to account to the plaintiff for their value at that time. The defendants on the hearing of this motion produce the bonds, and upon inspection it appears that there was no such

writing upon their face. The defendants contend that this evidence is not cumulative, because it is evidence of a different character from any which was offered by them on the trial upon this issue, and authorities are cited to the effect that cumulative evidence,
52 simply speaking, is evidence of the same kind to the same point. Motions for a new trial are addressed largely to the discretion of the court. Without entering into the question of whether the defendants in the exercise of proper diligence could not have produced this evidence at the trial, I do not think, in view of the evidence taken as a whole, that the defendants can fairly claim the right to a new trial on this ground. The direct evidence of Preble was not of a positive and conclusive character, and it was so fully met by the defendants' evidence that it does not seem to me that the court should direct a new trial by reason of the discovery of this additional evidence.

The verdict in this case was general, but the jury handed to the court with the verdict a paper containing the special items upon which they held the defendants liable. I do not think, on a motion for a new trial, the court should reject this paper. It is perhaps the best evidence possible of the ground the jury took in arriving at their verdict. Comparing this paper with the evidence, it appears that the jury made a mistake with respect to two items. There was no evidence to support the finding of the jury as to one of the Chicago sewerage bonds, which did not come into the hands of the defendants, but which was sold by Edward Preble to another firm of brokers, nor as to one Minneapolis bond which it appears was loaned to him by his mother in 1877. With respect to the $2,000 New York and New England bonds I do not agree with defendants that there was no evidence to support the finding of the jury. By the defendants' evidence, they sold for Edward Preble $2,000 of these bonds on or about October 31, 1879. While Mrs. Preble denied in cross-examination the possession of any of these bonds, she stated on her direct examination that the proceeds of the Lewis notes were, about 1876, put into these bonds or into Southern Pacific bonds.
Mrs. Preble seldom went to her safe and she may not have
53 known about these bonds. Taking all the evidence together, I cannot say that the jury were mistaken in their finding on this item. The verdict was for $34,772.88, and there should be a remission of $2,636.53 covering the value of $1,000 Chicago sewerage and $1,000 Minneapolis bonds, with premium and interest, and the plaintiff may elect to take judgment for $31,136.35 or a new trial will be granted. Arkansas Val. Land and Cattle Co. *v.* Mann, Sup. Ct. Rep., vol. 9, p. 458; Kennon *v.* Gilmer, *id.*, p. 696.

Opinion of the Court. (*October* 11, 1889.)

COLT, *J.*:

The excess of interest computed by the jury in making up their verdict and which was overlooked by the court at the first hearing upon this motion is opposed by the plaintiff on two grounds: First, it is said that the schedule handed to the court by the jury with the

verdict should not be received by the court as evidence showing the special items upon which the jury held the defendants liable. This question I carefully considered before my decision on the first hearing of this motion. The paper in question was intended by the jury to show a list of the different securities which they held the defendants had wrongfully converted to their own use, and the manner in which they computed the amount of the verdict rendered. It is not a loose paper found in the file of papers in this case, as contended for by the plaintiff, but it is a paper brought in by the jury with their verdict and handed up to the court in open court with their verdict. The amount as exhibited by this schedule is the exact amount of the verdict. It would, it seems to me, work great injustice to say that the court could not correct an error in computation made by a jury by consulting a paper handed by them to the court with the verdict, and which it may fairly be presumed was so presented for the purpose of correcting any mistake if found.

The second ground of objection urged by the plaintiff is that the jury must have found that this was a case of conspiracy between the son of the plaintiff and the defendants to defraud the plaintiff, and that therefore the jury had a right to include in their verdict a rate of interest in excess of six per cent. or compound interest, or in fact any sum they might deem proper; but there is clearly no force in this argument because the cause of action in this case was trover and the verdict must be examined from the standpoint of the cause of action which was brought and not from the standpoint of another cause of action which might have been brought.

The jury have found the date at which this property was converted. They have also found its value at the time of conversion, but in their computation of interest they have committed an error amounting to $2,639.83.

The plaintiff may elect to take judgment for $28,496.52 or a new trial will be granted.

The plaintiff's motion to withdraw remittitur filed after the first decision on this motion is granted.

54 *Opinion of the Court.* (*December* 10, 1889.)

COLT, *J.:*

The question now before the court is whether a bill of exceptions can be allowed in this case. A verdict was rendered for the plaintiff December 20, 1888, and on December 22, the counsel for the plaintiff consenting, twenty days were allowed the defendants within which to file a bill of exceptions. On January 11, 1889, or within the twenty days, the counsel for the defendants took their proposed bill of exceptions to the clerk's office of the circuit court and handed it to the deputy clerk, who then wrote across it in pencil the following memorandum: "Rec'd Jan. 11, 1889." The objection is made that this was not a filing of the bill of exceptions, and that consequently no bill is now before the court. I cannot see the force of this objection. So far as the counsel for the defendants is concerned the bill should be considered as filed when taken to the clerk's office

and placed in the hands of the proper officer for filing. The form of endorsement which the clerk as a matter of practice or of convenience puts upon the paper is immaterial and cannot affect the rights of the parties. Whether notice was given the plaintiff's counsel of the filing of the bill or a copy was served upon him or whether what was done was in conformity with the practice in the State courts (Pub. Stat. of Mass., 847) are also immaterial because the practice and rules of the State court do not apply to proceedings in the circuit court taken for the purpose of reviewing in the supreme court a judgment of the circuit court, and such rules and practice embracing the preparation, perfecting, settling, and signing of a bill of exceptions are not within 914 of the Revised Statutes. Chateaugay Iron Co., petitioners, 128 U. S., 544, 553.

The counsel for the plaintiff raises the further objection to the allowance of any bill of exceptions in this case that a bill of exceptions cannot be signed after the term at which the trial took place except with the consent of counsel or the express order of the court, and that in the present case more than one term has elapsed since the trial. After a careful examination of the cases referred to by counsel I conceive the rule to be this: that a bill of exceptions must be signed at the term in which judgment was rendered. This rule is subject to certain exceptions dependent upon special circumstances which, however, it is not necessary to consider in this case. I admit that the expression is sometimes used "at the term the trial was had" as distinguished from the phrase "at the term judgment was rendered." The true rule, however, is stated by Chief Justice Waite in Muller *v.* Ehlers, 91 U. S., 249, in the following language: "As early as Walton *v.* United States, 9 Wheat., 651, the power to reduce exceptions taken at the trial to form and to have them signed and filed was, under ordinary circumstances, confined to a time not later than the term at which the judgment was rendered. This, we think, is the true rule and one to which there should be no exceptions without an express order of the court during the term or consent of the parties, save under very extraordinary circumstances." In the present case the motion for a new trial was not finally disposed of until October 12, 1889, and no judg-
55 ment has as yet been entered upon the verdict. As soon as the motion for a new trial was overruled the defendants' counsel asked to have their bill of exceptions allowed. The consideration of the bill of exceptions was unnecessary until the motion for a new trial was decided, because that motion might have been granted when the exceptions would fail as a new trial would take place. The course of proceedings in this case shows the reason and justice of the rule that it is the term at which judgment is rendered rather than the term at which the trial was had that a bill of exceptions must be signed.

For these reasons I shall hold that the bill of exceptions in this case filed by the defendants with the clerk is properly before the court.

Assignment of Errors and Prayer for Reversal. (*Filed May* 27, 1890.)

The defendants, by their attorney, come and say that in the records and proceedings in said action there is manifest error in this, to wit:

1. That the court allowed the plaintiff's attorney to ask the plaintiff in her direct examination what instructions, if any, she gave her son when she sent him home from California.

2. That the court allowed the plaintiff's attorney to ask the plaintiff in her direct examination whether her son informed her after he returned to California what he had done with the property and what he reported he had done with it.

3. That the court admitted the question, put to the plaintiff in her direct examination in reference to her property other than twenty-eight hundred four per cent. Government bonds and thirty shares of Old Colony sold by her, "Did you authorize any to be sold?"

4. That the court excluded the question, put to the plaintiff in cross-examination, "Did you state to your counsel in this suit the amount of your claim?"

5. That the court excluded the question, put to the plaintiff in cross-examination, if she intended to prosecute her prior suit in the State court against the same defendants.

6. Also, the question "Have you directed that suit to be discontinued?"

7. That the court admitted in evidence the page which plaintiff testified had been cut from an earlier memorandum book and pinned into the memorandum book which she had annexed to her deposition.

8. That the court admitted as evidence the 1st, 2nd, 3d, 4th, 5th, 6th, 7th, 8th, and 9th leaves of said memorandum book and page marked X, copies of which leaves and page are annexed to the bill of exceptions and marked "Exhibit A."

9. That after the close of the case and when the jury were about to retire to consider their verdict the court allowed the whole of the memorandum book to go to the jury without any sealing or
56 other protection of the leaves and pages not put in evidence.

10. That the court allowed the plaintiff to ask the witness, Edward Preble, in his direct examination, what instructions he received from his mother about her property which was in the hands of Edward Richardson.

11. That the court admitted the question, put to the witness Edward Preble in his direct examination, whether his mother understood that the ten shares of the Old Colony stock purchased with the money drawn from the Provident Institution for Savings, and certificates of which were made out in the name of Edward Preble, were her property or not.

12. That the court excluded the question, put to Edward Preble on cross-examination, "Were you in good standing financially among your acquaintances in the fall of 1879?"

13. That the court excluded the question, put to Edward Preble in his cross-examination, "Upon what property as being your property have you brought suit against Messrs. Bates and Walley which is now pending?"

14. That the court excluded the question, put to the witness I. C. B. Walley in his direct examination, whether he heard the plaintiff say anything at the time that she gave her deposition in Portland in the summer of 1887 as to where and in whose possession were the empty envelopes which she testified she found in her box in 1882, and on which she said were written the words "the property of Sarah A. Preble."

15. That the court excluded the two interrogatories and answers in plaintiff's deposition, offered in evidence by the defendants, in which she testified in regard to the empty envelopes found by her in her box in 1882, and on which she said were written the words "the property of Sarah A. Preble."

16. That the court allowed the plaintiff to ask her junior counsel, L. C. Southard, as a witness, whether Edward Preble told him that Walley advised him, Preble, to erase the writing on the $500 United States bond.

17. That the court excluded the record of the superior court in the county of Suffolk in the case of Edward Preble against these defendants, offered in evidence by the defendants for the purpose of contradicting the witness Edward Preble and for the purpose of showing that in 1884 he claimed to be the owner of the securities sued for in the case at bar, and that said suit was still pending.

18. That the court excluded the record of the said superior court in the case of Sarah A. Preble against these defendants, consisting of the writ, plaintiff's declaration, defendant's answers, the interrogatories filed by the defendant to be answered by the plaintiff, and the plaintiff's answers thereto, offered by the defendant for the purpose of showing that in 1883 she claimed to be the owner of a small portion only of the securities sued for in the case at bar, and that said suit was still pending, and for the further purpose of contradicting the plaintiff.

19. That the court refused to rule and instruct the jury that upon the evidence in the case the plaintiff could not recover upon any transactions which were had between the defendants and her son before January 25, 1881.

20. That the court refused to rule and instruct the jury
57 that if they should find upon the evidence that the defendants, in the year 1880, converted to their own use seven Minneapolis 8 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, and applied them as collateral to Edward Preble's indebtedness to them, the plaintiff could not recover damages for the conversion of such bonds in this action.

21. That the court refused to rule and instruct the jury that if the jury should find upon the evidence that the defendants in the year 1880 converted to their own use two Eastern Illinois 6 % bonds, of the par value of one thousand dollars each, the property of the

plaintiff, the plaintiff could not recover for the conversion of such bonds in this action.

22. That the court refused to rule and instruct the jury that if the jury should find upon the evidence that the defendants converted to their own use three Oregon Navigation Company 6 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff could not recover for the conversion of such bonds.

23. That the court refused to rule and instruct the jury that upon the evidence in this case the plaintiff never became the owner of the three Oregon Navigation Company 6's specified under item 3 of the first count of her declaration, and the defendants could not be held liable therefor in this action.

24. That the court refused to rule and instruct the jury that if the jury should find upon the evidence that the defendants purchased in New York, in 1880, three Oregon Navigation Company 6 % bonds by the direction and for the account of Edward Preble, and that those bonds were never received by the defendants, but remained in New York in the hands of the correspondents of the defendants, and were sold by the order of Edward Preble in 1881 without notice to the defendants, either at the time of the purchase or of the sale, that the plaintiff had any interest in the transaction, there was no conversion of those bonds, and the plaintiff could not recover therefor in this action.

25. That the court refused to rule and instruct the jury that if the jury should find upon the evidence that the defendants, in April, 1880, converted to their own use four Chicago sewerage 7 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff could not recover for such conversion in this action.

26. That the court refused to rule and instruct the jury that if the defendants received from Edward Preble four Chicago sewerage bonds, of the par value of one thousand dollars each, with instructions to sell the same for him, and thereupon the defendants did sell the same and turned over the proceeds of such sale to Edward Preble, after deducting their commissions, the plaintiff cannot recover, although she was the owner at that time of such bonds, unless she proves that the defendants acted in bad faith and knew that the plaintiff was the owner of those particular bonds.

27. That the court refused to rule and instruct the jury that if the jury should find upon the evidence that, in October, 1879, the defendants wrongfully converted to their own use four New York & New England 7 % bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff could not recover for such conversion in this action.

58 28. That the court refused to rule and instruct the jury that if the defendants, in October, 1879, purchased for the account of Edward Preble and by his direction four New York & New England 7 % bonds, of the par value of one thousand dollars each, and delivered said bonds to said Edward Preble, the defendants are not liable in this action therefor.

29. That the court refused to rule and instruct the jury that upon

the evidence in this case the plaintiff is not entitled to recover for the conversion of five New York & New England 7% bonds, of the par value of one thousand dollars each, as stated in item 5 of the first count of her declaration, nor for the conversion of any of them.

30. That the court refused to rule and instruct the jury that the burden of proof is on the plaintiff in this case to show by a preponderance of the evidence as to each cause of action upon which she relies that it accrued within six years before the date of the writ in this case.

31. That the court refused to rule and instruct the jury that there was no evidence in this case upon which the jury would be authorized to find that there was any fraudulent concealment by the defendants from the plaintiff of any of the causes of action upon which this suit is brought.

32. That the court ruled as a matter of law and instructed the jury in relation to the statute of limitations and with reference to the fraudulent concealment of the cause of action as follows: "Now, gentlemen, I shall charge you as matter of law this: That if you believe that the defendants here were not guilty of any fraud in these transactions, if you believe that they took negotiable securities in, if you please, the ordinary course of their business and sold them, then Mrs. Preble would not have a right in this case to bring suit for anything that took place prior to January, 1881; but, on the contrary, if from the evidence you believe that Walley, one of the defendants, conspired with young Preble to obtain these bonds and afterwards to conceal the fact from the mother, he, Edward, having the key to the safety box containing the securities, this would be evidence going to prove a fraudulent concealment of the cause of action such as would bring it within the exception of the statute. So that, gentlemen, whether there was a fraudulent concealment of the transactions such as would make Mrs. Preble's whole claim good here turns upon the question whether you believe from the evidence which has gone in before you that the defendants here acted in the ordinary course of their business or whether you believe upon the evidence that one of the defendants, Walley, was a co-conspirator with Preble in these transactions, and that young Preble also had the key to his mother's safe, so that, if you please, his mother with great difficulty could obtain access to it or knowledge as to whether those securities existed or not. Those rules of law, gentleman, you will apply upon the subject of the statute of limitations."

33. That the verdict was rendered in favor of the plaintiff, whereas it ought to have been for the defendants.

34. That the judgment was given for the said plaintiff against the said defendants, whereas said judgment ought to have been given for the defendants.

59 And the said defendants pray that the said judgment aforesaid may be reversed, and that they be restored to their rights.

By their attorney, SAM'L HOAR.

UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled No. 2810, law docket, Sarah A. Preble, plaintiff, *v.* Henry M. Bates *et al.*, defendants, The Massachusetts National Bank *et al.*, alleged trustees, determined in said circuit court, and of the opinions of the court, and of the assignment of errors and prayer for reversal therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twentieth day of June, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

60 (*Bond on Writ of Error.*)

Know all men by these presents that we, Henry M. Bates, of Newton, and I. C. Bates Walley, of Boston, both in the Commonwealth of Massachusetts, as principals, and William G. Weld, of Newport, in the State of Rhode Island, and Henry L. Higginson, of Boston and of Manchester, Massachusetts, and Joshua M. Sears, of said Boston, as sureties, are held and firmly bound unto Sarah A. Preble, of Portland, in the State of Maine, in the full and just sum of fifty thousand dollars, to be paid to the said Sarah A. Preble, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the tenth day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said Sarah A. Preble, plaintiff, and the said Henry M. Bates and I. C. Bates Walley, copartners doing business under the firm name and style of H. M. Bates & Walley, defendants, and others, alleged trustees, judgment was rendered against the said defendants, and the said defendants having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendants shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make their plea good, then

the above obligation to be null and void; otherwise to remain in full force and virtue.

HENRY M. BATES. [L. S.]
I. C. BATES WALLEY. [L. S.]
WM. G. WELD. [L. S.]
HENRY L. HIGGINSON. [L. S.]
JOSHUA M. SEARS. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN G. STETSON.

Approved.
LE BARON B. COLT,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

[Seal of the Circuit Court, Massachusetts.]

Attest:
JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Case No. 14,063. Massachusetts C. C. U. S. No. 123. Henry M. Bates and I. C. Bates Walley, plaintiffs in error, *vs.* Sarah A. Preble. Filed June 30, 1890.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1893. Term No., 123.

HENRY M. BATES AND I. C. BATES WALLEY,

PLAINTIFFS IN ERROR,

v.

SARAH A. PREBLE.

BRIEF FOR PLAINTIFFS IN ERROR.

SAMUEL HOAR,
Counsel.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL.
1893.

Supreme Court of the United States.

No. 123. October Term, 1893.

HENRY M. BATES AND I. C. BATES WALLEY,
Plaintiffs in Error,

v.

SARAH A. PREBLE.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The writ in this action was dated Jan. 25, 1887. The declaration contained a count in tort and a count in contract, both for the same cause of action; at the trial the plaintiff abandoned the count in contract and the case was tried upon the count in tort, which was for the conversion of certain bonds, stocks, and money (Record 2) claimed to be the property of the plaintiff.

The plaintiff claimed and undertook to prove that she kept her securities in a box in the vaults of the Union Safe Deposit Company in Boston; that she intrusted the key to the box and access to the vaults to her son, Edward Preble; that she visited the box in 1878 and found all her securities there; that she next visited it in the autumn of 1882 and found all her securities gone; that at various times between 1878 and 1882 her son Edward stole or embezzled her various securities from the box to which she had given him access; that he took them to the defendants, who were stock brokers, and that the defendants, without authority

from her, sold said securities for him; that Walley, one of the defendants, had notice that the securities belonged to the plaintiff, and fraudulently concealed from her the fact of the conversion, and that she did not discover the conversion till within six years before the bringing of the suit.

The defendants in the original suit claimed in defence and sought to prove at the trial that some of the securities they never sold or dealt with in anyway; that others of the securities they received from Edward Preble and disposed of by his directions, and on his account, in the ordinary course of business, believing them to be his property; and that they had no knowledge or notice that any of the property belonged to Sarah A. Preble; that some of the securities did not belong to her, and that if Sarah A. Preble ever had any cause or causes of action against them for the conversion of said securities, the same arose more than six years before the bringing of said action; that they never concealed from her any such causes of action, and that said cause or causes of action, if any, are barred by the Statute of Limitations.

The jury returned a verdict for the plaintiff in the original suit for $34,772.88 damages, and handed to the Court with their verdict a schedule (Record 5) containing the special items on which they held the defendants liable (Record 50), showing the securities which they found to have been converted by defendants, the value of the same, the date of the conversion of each, and the calculations of interest from said dates (Record 51), from which it appears that they found that the defendants had converted—

Eight $1,000 Minneapolis 8% bonds in Dec. 1879.

One $1,000 Eastern Ill. 6% bond on Dec. 1, 1879.

Three $1,000 Oregon Navigation 6% bonds on Dec. 1, 1879.

Five $1,000 Chicago Sewerage 7% bonds in Jan. 1880, and

Two $1,000 New York & New England R.R. 7% bonds in January 1880.

An examination of this schedule showed that the jury, contrary to the rules of law, had (1) reckoned interest at a

greater rate than six per cent.; (2) had compounded interest, and (3) had calculated the time between dates erroneously.

Upon a motion for new trial (Record 6) filed by the defendants, the justice before whom the case was tried held that there was no evidence to sustain the finding of the jury as to one of the Chicago Sewerage bonds and one Minneapolis bond (Record 49 and 50), and that there should be a remission from the amount of the verdict of the value of those bonds and interest thereon or a new trial should be granted.

Upon a motion for a rehearing upon the motion for a new trial filed by defendants (Record 9), the justice held that the jury had found the date at which the property was converted, being the time from which they reckoned interest on each security; that there should be a still further remission from the verdict of $2,639.83 for error in the calculation of interest, and that the plaintiff might elect to take a verdict for $28,496.54, or a new trial should be granted (Record 50 and 51). A remittitur was filed by the plaintiff "under compulsion" (Record 11), and judgment for the amount of the verdict so reduced and interest was thereupon entered (Record 47); so that by the verdict of the jury, as modified by the Court, the plaintiffs in error are found to have converted —

Seven Minneapolis bonds in Dec. 1879;

One Eastern Ill. bond on Dec. 1, 1879;

Three Oregon Navigation bonds on Dec. 1, 1879;

Four Chicago Sewerage bonds in January, 1880;

Two New York & New England R.R. bonds in January, 1880, —

all, it will be observed, at dates which are more than six years before the bringing of this suit.

As the jury has found that all the securities were converted more than six years before the bringing of the suit, and as the defendants in the absence of such finding would have a right to assume that the dates were more than six years before the suit, because the Court refused to rule that defendants were not liable for any conversion more than six years before suit, the several exceptions founded on the refusals to rule

and the rulings on the Statute of Limitations present but one question: Whether there is any evidence of fraudulent concealment of the causes of action by the defendants.

The questions presented in this case for the determination of the Court are: (1) Those raised by the exceptions to the admission and exclusion of evidence specified in the Assignment of Errors, Nos. 1 to 18, inclusive, except Nos. 1, 5, 6, 10, 13, and 17, which are waived.

(2) The questions raised by the exceptions to the refusal of the judge to rule as requested by defendants (Record 32) and to the charge given (Record 34) being Assignments of Errors 19 to 32, inclusive, except Nos. 22 and 26, which are waived, viz.: (1) Whether there is any evidence that the plaintiffs in error fraudulently concealed from the defendant in error each of the causes of action upon which the said defendant recovered (Assignments of Error 19, 20, 21, 25, 27, 30, 31, and 32); and (2) Whether the 6th, 7th, 12th, and 13th requests for instructions (Record 33, or Assignents 23, 24, 28, and 29) ought not not to have been given; and whether such parts of the charge as are inconsistent therewith (Record 34 to 37) are not erroneous.

SPECIFICATION OF ERRORS RELIED UPON.

1. (Waived.)

2. That the Court allowed the plaintiff's attorney to ask the plaintiff in her direct examination whether her son informed her after he returned to California what he had done with the property, and what he reported he had done with it.

3. That the Court admitted the question, put to the plaintiff in her direct examination in reference to her property other than twenty-eight hundred four per cent. Government bonds and thirty shares of Old Colony stock sold by her, "Did you authorize any to be sold?"

4. That the Court excluded the question, put to the plaintiff in cross-examination, "Did you state to your counsel in this suit the amount of your claim?"

5. (Waived.)

6. (Waived.)

7. That the Court admitted in evidence the page which plaintiff testified had been cut from an earlier memorandum book, and pinned into the memorandum book which she had annexed to her deposition.

8. That the Court admitted as evidence the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th leaves of said memorandum book and page marked X, copies of which leaves and page are annexed to the bill of exceptions and marked "Exhibit A."

9. That after the close of the case, and when the jury were about to retire to consider their verdict, the Court allowed the whole of the memorandum book to go to the jury without any sealing or other protection of the leaves and pages not put in evidence.

10. (Waived.)

11. That the Court admitted the question, put to the witness, Edward Preble, in his direct examination, whether his mother understood that the ten shares of the Old Colony stock purchased with the money drawn from the Provident Institution for Savings, and certificates of which were made out in the name of Edward Preble, were her property or not.

12. That the Court excluded the question, put to Edward Preble on examination, "Were you in good standing financially among your acquaintances in the fall of 1879?"

13. (Waived.)

14. That the Court excluded the question, put to the witness, I. C. B. Walley, in his direct examination, whether he heard the plaintiff say anything at the time that she gave her deposition in Portland in the summer of 1887 as to where and in whose possession were the empty envelopes which she testified she found in her box in 1882, and on which she said were written the words, "The property of Sarah A. Preble."

15. That the Court excluded the two interrogatories and answers in plaintiff's deposition, offered in evidence by the

defendants, in which she testified in regard to the empty envelopes found by her in her box in 1882, and on which she said were written the words, "The property of Sarah A. Preble."

16. That the Court allowed the plaintiff to ask her junior counsel, L. C. Southard, as a witness, whether Edward Preble told him that Walley advised him, Preble, to erase the writing on the $500 United States bond.

17. (Waived.)

18. That the Court excluded the record of the said Superior Court in the case of Sarah A. Preble against these defendants, consisting of the writ, plaintiff's declaration, defendants' answers, the interrogatories filed by the defendants to be answered by the plaintiff, and the plaintiff's answers thereto, offered by the defendants for the purpose of showing that in 1883 she claimed to be the owner of a small portion only of the securities sued for in the case at bar, and that said suit was still pending, and for the further purpose of contradicting the plaintiff.

19. That the Court refused to rule and instruct the jury that upon the evidence in the case the plaintiff could not recover upon any transactions which were had between the defendants and her son before Jan. 25, 1881.

20. That the Court refused to rule and instruct the jury that if they should find upon the evidence that the defendants, in the year 1880, converted to their own use seven Minneapolis 8 per cent. bonds, of the par value of one thousand dollars each, the property of the plaintiff, and applied them as collateral to Edward Preble's indebtedness to them, the plaintiff could not recover damages for the conversion of such bonds in this action.

21. That the Court refused to rule and instruct the jury that if the jury should find upon the evidence that the defendants, in the year 1880, converted to their own use two Eastern Illinois 6 per cent. bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff could not recover for the conversion of such bonds in this action.

22. (Waived.)

23. That the Court refused to rule and instruct the jury that upon the evidence in this case the plaintiff never became the owner of the three Oregon Navigation Company 6's specified under Item 3 of the first count of her declaration, and the defendants could not be held liable therefor in this action.

24. That the Court refused to rule and instruct the jury that if the jury should find upon the evidence that the defendants purchased in New York in 1880 three Oregon Navigation Company 6 per cent. bonds by the direction and for the account of Edward Preble, and that those bonds were never received by the defendants, but remained in New York in the hands of the correspondents of the defendants, and were sold by the order of Edward Preble in 1881 without notice to the defendants, either at the time of the purchase or of the sale, that the plaintiff had any interest in the transaction, there was no conversion of those bonds, and the plaintiff could not recover therefor in this action.

25. That the Court refused to rule and instruct the jury, that if the jury should find upon the evidence that the defendants, in April, 1880, converted to their own use, four Chicago Sewerage 7 per cent. bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff could not recover for such conversion in this action.

26. (Waived.)

27. That the Court refused to rule and instruct the jury that if the jury should find upon the evidence that, in October, 1879, the defendants wrongfully converted to their own use four New York & New England 7 per cent. bonds, of the par value of one thousand dollars each, the property of the plaintiff, the plaintiff could not recover for such conversion in this action.

28. That the Court refused to rule and instruct the jury that if the defendants, in October, 1879, purchased for the account of Edward Preble and by his direction, four New York & New England seven per cent. bonds, of the par value of one thousand dollars each, and delivered said bonds to

said Edward Preble, the defendants are not liable in this action therefor.

29. That the Court refused to rule and instruct the jury that, upon the evidence in this case, the plaintiff is not entitled to recover for the conversion of five New York & New England 7 per cent. bonds, of the par value of one thousand dollars each, as stated in Item 5, of the first count of her declaration, nor for the conversion of any of them.

30. That the Court refused to rule and instruct the jury that the burden of proof is on the plaintiff in this case to show by a preponderance of the evidence, as to each cause of action upon which she relies, that it accrued within six years before the date of the writ in this case.

31. That the Court refused to rule and instruct the jury that there was no evidence in this case upon which the jury would be authorized to find that there was any fraudulent concealment by the defendants from the plaintiff of any of the causes of action upon which this suit is brought.

32. That the Court ruled as a matter of law and instructed the jury in relation to the Statute of Limitations and with reference to the fraudulent concealment of the cause of action as follows: "Now, gentlemen, I shall charge you as a matter of law, this: That if you believe that the defendants here were not guilty of any fraud in these transactions; if you believe that they took negotiable securities in, if you please, the ordinary course of their business, and sold them, then Mrs. Preble would not have a right in this case to bring suit for anything that took place prior to January, 1881; but, on the contrary, if from the evidence you believe that Walley, one of the defendants, conspired with young Preble to obtain these bonds and afterwards to conceal the fact from the mother, he, Edward, having the key to the safety box containing the securities, this would be evidence going to prove a fraudulent concealment of the cause of action such as would bring it within the exception of the statute. So that, gentlemen, whether there was a fraudulent concealment of the transactions such as would make Mrs. Preble's whole claim good here turns upon the question whether you believe from

the evidence which has gone in before you that the defendants here acted in the ordinary course of their business or whether you believe upon the evidence that one of the defendants, Walley, was a co-conspirator with Preble in these transactions, and that young Preble also had the key to his mother's safe, so that, if you please, his mother with great difficulty could obtain access to it or knowledge as to whether those securities existed or not. Those rules of law, gentlemen, you will apply upon the subject of the Statute of Limitations."

33. That the verdict was rendered in favor of the plaintiff, whereas it ought to have been for the defendants.

34. That the judgment was given for the said plaintiff against the said defendants, whereas said judgment ought to have been given for the defendants.

POINTS AND AUTHORITIES.

I. — (E. 2.)

That the plaintiff's son reported to her what he had done with the property, and what he reported he had done with it (Record 13) was wholly immaterial. The only force that this testimony could possibly have would be its tendency to prove the truth of what he told her, namely: that he had placed the property in the safe deposit vaults in the care of Bates & Walley; as tending to prove that fact it was purely hearsay and does not come within any of the well-defined exceptions to the rule of law excluding hearsay evidence.

II. — (E. 3.)

The question, "Did you authorize any to be sold?" was not proper; the question is leading, and calls for the witness' opinion or inference on a mixed question of law and fact. She may be asked to state what she said to her son and leave it to the tribunal to infer whether that did or not contain an authority. To ask the question in the form allowed in this case gave the witness an opportunity to give in her answer her own inference drawn from what she said or did, in-

it was her own book, in her own handwriting, never seen by any one till it went into the hands of counsel; that the entries were made in it from time to time; that it showed the securities which she had, which went into the box in the safe deposit vaults. Upon her examination-in-chief she was shown one page, which she testified was cut from an earlier memorandum book kept by her, and which was pinned into this book. She testified that that page showed what securities she had in her box in 1878. . . ." (Record 18): "That she could tell what securities she had in her box from her book."

(Record 18). "On cross-examination she testified with reference to the first page of her memorandum book: that the figures at the top in pencil she put there when she took the page out of the other book and put it into that book; those figures in pencil were 1877 and 1878; that she did not remember at what time she did this; that it was before 1882 and was after she cut it out of the other books; that she didn't remember when she became possessed of the Grand Prize stock; that it was after she came from Santa Barbara, but had no memorandum; that she put it on the book at the time the transfer was made. . . ."

(Record 19): ". . . That she had no memorandum except what was on that paper in the book; that some of it was written in ink and some in pencil; that what was in ink was written when it was in the other book; that the pencil part was written after it was put into this book; that the summing up was made by her, but was not correct; that at the bottom of the page the value appeared to be as of 1871; that she didn't know whether it was its correct value in 1871 or in 1877; that she had testified from that page of the book and from no other part;" . . . "that the book says twenty shares of Old Colony stock; that she didn't remember that she had thirty shares as early as 1878. She didn't remember looking at the number; that she knew at some time that she had thirty shares of Old Colony stock, but she didn't remember the time; . . . (Record 20): that the first item on the first leaf of the book was forty-eight hundred-dollar

United States four per cent. bonds; that she had told what was done with twenty-eight hundred dollars of them, but didn't know what was done with the other two thousand dollars; that she must have sold them, but didn't remember the time; . . . that the eight-thousand-dollar State of Maine 6 per cent. bonds were always in her box; that her impression was that they were in there in 1878; that she didn't know why there was a pencil mark across that item on the first page of her book; . . . (Record 32): She testified that the entries in her memorandum book were not reliable; that she could not tell when she made the entries upon them or when the figures were set down; that she couldn't tell why she made the entries nor why she had struck out any of them."

From this evidence it must be clear, without any argument, that not one of the "indispensable preliminaries" necessary to the introduction of such a memorandum was shown in this case.

1. Does it appear that the memorandum was made at or near the time of the event, that is, at the time when she examined her box in 1878, or as the several securities were placed in the box, and what was the purpose of the memorandum?

It was not made at the time that she examined her box, for she testifies that the entries were made from time to time. She does not say that the entries were made when the several securities were put into the box. The entry of the Grand Prize stock she says was made when the stock was transferred to her. The last item on the page would seem to have been made in 1871. But we find a definite answer to our questions in the last few lines of her testimony: "That she could not tell when she made the entries upon them or when the figures were set down; that she could not tell why she made the entries nor why she had struck out any of them."

2d. Does it appear that she knew the facts at the time of making the memorandum, and has she sworn "positively" to the correctness of it? As she did not know why she made it, or what it was made to represent, she could not

testify that it was correct. It was offered, however, for the purpose, if for any distinct purpose, of showing what securities were in her box in 1878 (Record 14). If we take it to be a memorandum of that fact, either it is false, or she did not know the facts she entered there; for it contains an item of fifteen shares Consolidated Virginia, but she testified that she never saw any certificate of Consolidated Virginia stock (Record 19). She could have no personal knowledge, then, that it was in her box in 1878, or at any other time. But far from swearing to the correctness of the memorandum, she testifies that she did not know whether the last item represented the correct value in 1871 or in 1877; she did not know why she had struck out the entry of the State of Maine bonds, or why she had struck out any of the entries; she swears positively "that the entries in her memorandum book were not reliable (Record 32).

3d. Does it appear that after refreshing her memory by reading this page of her book she was unable to tell from recollection what securities of those for which suit was brought were in her box in 1878, this being the only purpose for which the evidence was offered? (Record 14). The entries on this page relating to securities for which suit was brought were only some five or six of the twenty entries upon this page. It nowhere appears that she could not testify as to them from memory. To exclude this page it is not necessary to show that she could testify from recollection; the accepted rule is that to make the memorandum admissible it must appear that she had no recollection of the fact.

(Russell *v.* Hudson R.R.R. Co. *ub. sup.*)

Here not only is there no evidence that she did not remember the facts, but there is unmistakable evidence that she did remember: "She did see there at that time (1878) eight thousand dollars State of Maine 6 per cent. bonds and eight thousand dollars Minneapolis 8 per cent. bonds, five thousand dollars Chicago Sewerage 7 per cent. bonds, and one thousand dollars Central Pacific bond, and thirty shares of Old Colony stock" (Record 19). The same evidence is

repeated on pages 20, 21, 32 of the Record. She did not know when she became possessed of the Grand Prize stock, but as she found the certificate in 1882 in her box that is immaterial, so that we find that she had at the time of the trial a distinct recollection, independent of the memorandum of the facts entered thereon which were material to the case.

Therefore, for these various reasons we submit that the first page of the memorandum book ought not to have been admitted in evidence.

V. — (E. 8.)

The first nine leaves of the memorandum book and the page marked "X," copies of which marked "Ex. A" are printed on pages 38 to 46 of the Record, ought not to have been admitted in evidence. We have considered the first page already. All that we have said in regard to that page applies with equal or greater force to this part of the book; but there are several additional objections to these leaves.

We have already seen that "it is only as auxiliary to and not as a substitute for oral testimony of the witness that the writing is admissible;" (Russell *v.* Hudson R. R.R. Co., *ub. sup.*); but there was no testimony about any other part of the book than the first page. She testified (Record 19), speaking of the first page of her book, "that she had no memorandum except what was on that paper in the book . . . that she had testified from that page of the book, and from no other part." The only testimony after that statement, that could possibly refer to any part of the book other than the first page, is what she says on page 32 of the Record, that the entries in her memorandum book were not reliable; she could not tell when she made the entries upon them or when the figures were set down; why she had made the entries, nor why she had struck out any of them."

So we have here a writing, put in as evidence, about which we know absolutely nothing, except, perhaps, that it was made by Mrs. Preble, and that its items are not reliable.

We do not know for what purpose it was made, when it

was made, whether before the suit was brought or after, or under what circumstances; whether it is original or a copy; what transactions or condition of things it was made to perpetuate, or for what purpose it was put into the case.

It is not a memorandum of what securities she had in her box during the years indicated at the top of each page. The page marked "X" (Record 46) has no date upon it from which to guess to what time it refers. It follows a page marked 1883–1884. The pages bearing dates 1880, 1881, and 1882 (Record 49–44), bear items relating to the Minneapolis bonds, the Eastern Illinois bonds, and the Oregon Navigation bonds, which the jury found had been sold in 1879, and pages bearing dates 1881 and 1882, have items relating to the Chicago bonds and the New York & New England bonds, which the jury found were sold in 1880. Besides, Mrs. Preble testified that she did not see her box or its contents from 1878 to 1882 (Record 18), so she could not know what was in it between those dates. Moreover, she testified that "she never saw any Oregon Navigation 6 per cent. bonds, and never received or saw any Eastern Illinois bonds . . . ; she never had any New York & New England 7 per cent. bonds in her possession, and never saw them in her box" (Record 20). "She never saw any certificate of Consolidated Virginia stock" (Record 19), yet entries relating to these securities appear on every page except the second page of the eighth leaf and the two pages of the ninth leaf. What possible entry could she make about these securities that would be of any value as evidence? There is very little else on these pages relating to the subject-matter of this suit.

On the second page of the eighth leaf and on both pages of the ninth leaf (Record 44, 45, and 46) there is not one entry that has the remotest connection with questions at issue, and we cannot conjecture any grounds on which these pages should be admitted in evidence. They could serve no legitimate purpose in the trial; they were well calculated, however, to serve the very illegitimate purpose of prejudicing the minds of the jury in favor of the plaintiff. The dra-

matic "All gone!!!" on the first page of the eighth leaf, preceded as it is by memoranda of large dividends and followed by memoranda of small borrowings, is too striking to fail of its natural effect on the jury in arousing their sympathy for the plaintiff to the prejudice of the defendant's rights. For these reasons, as well as those stated above in the discussion of the exception to the first page, these pages of the memorandum book are clearly not competent evidence.

But even if they were competent, it was not proper to admit them, as they were in this case (Record 15), after the defendants' evidence was all in; for the defendants were thereby deprived of the opportunity of cross-examining the plaintiff in regard to them, or of putting in evidence to explain or meet them. Even where a memorandum is produced merely for the purpose of refreshing a witness' memory, the opposite party has a right to cross-examine the witness in regard to it (Com. *v.* Jeffs, 132 Mass. 5). There is much more necessity for giving him that right when the writing is admitted as evidence in itself. The plaintiff's counsel having offered the book in evidence while the plaintiff was on the witness-stand should not be permitted to wait till all the evidence was in before pointing out what part of it he wished to go to the jury.

We submit, then, that these pages of the memorandum book ought not to have been admitted in evidence, 1st, because they are in themselves clearly incompetent as evidence; 2d, because they were not put in at the proper time.

VI. — (E. 9.)

At the close of the evidence, the Court admitted the first nine leaves, and page X of the memorandum book, and directed that the rest of the book should be sealed up or otherwise protected from the inspection of the jury. This was a direct intimation to the jury that they need not charge their minds with remembering what pages were put in as evidence, and they had a right to rely on the statement that the rest of the book would be sealed up. The case was argued by defendant's counsel with the understanding that this would be done.

After the charge had been given, and as the jury were about to retire to consider their verdict, the Court, against the objection, and subject to the exception of the defendants, permitted the whole book to go to the jury without any sealing or other protection of the leaves and pages not put in evidence, and directed them not to examine any part of the book except what was put in evidence (Record 15). We submit that this was irregular, and that the right of the defendants to have nothing go into the hands of the jury but what has been put in as evidence were not sufficiently protected.

A copy of parts of the book which had not been put in evidence, and was taken to the jury-room without being sealed up is found in Exhibit B, Record 46. The greater part of this relates directly to the questions at issue, but would clearly be inadmissible if testified to under oath. Much of it if read by the jury could not fail to prejudice their minds against the defendant Walley, regarding whom we find in this part of the book the following: "At one time during the absence of my son in 1877 or '8, Mr. Bates Walley collected interest on Old Colony Railroad. If I remember correctly, as he handed it to me I expressed my dissatisfaction, the amount not being in full. This was at 40 State street, in the building where his office was. I greatly disliked this man; often warned my son, as he for years shadowed him by night and day; always after him to drive or walk."

Other parts are as well calculated to awaken sympathy for the plaintiff and tend to explain or account for a state of ignorance on her part in regard to her securities that may otherwise seem extraordinary, if not suspicious. "At this time I took no interest in my money affairs so painful was physical suffering." "After one year of agony and distress our heavenly Father, in His merciful kindness, seems to be opening a way of success for my dear distressed son. Light begins to dawn upon our path. Accept our grateful prayer, O Father of Love and Mercy! Deceived in our prospects. May 13, 1884. No success." (Record 47.)

Such is the writing that was given into the hands of the jury on their retirement without any separation whatever from the rest of the book, without any mark upon that or upon the rest of the book to indicate what had been put in evidence or what had not. Without any warning to the defendants' counsel that these pages were going to the jury so that in the course of his argument he might refresh their memory as to what pages had been put in evidence, without anything to keep the jury from reading these pages except the single direction from the Court not to examine any part of the book except what was put in evidence, and whatever recollection they may retain of the numbers of some ten pages which were read to them at the close of the testimony, with an intimation that there would be no need to remember those pages.

But if we were certain that the jury could remember just what pages were put in from hearing them read one or more days previously, it is not the practice to trust that the jury will follow the directions of the Court, not to consider a paper as evidence where it is possible to keep that paper from them. The deliberations of the jury are in secret, and their conduct while considering their verdict is not open to the inspection of the Court or the parties to the suit, and jurors themselves will not be allowed to testify to their own or their fellows' misconduct during such deliberations.

Packet Co. *v.* Sickles, 5 Wall. 580.
Woodward *v.* Leavitt, 107 Mass. 453.
Rowe *v.* Canney, 139 Mass. 41.

For this reason it is important that the opportunities for mistake or misconduct in the jury room should be minimized. It has been accordingly held that when a memorandum which is not admissible in evidence has been given to the jury, the error is not cured by instructing them that they are not to consider it as evidence. This is especially true where, as in this case, the paper is not merely immaterial, but is well calculated to influence the minds of the jury to the prejudice of the excepting party.

Commonwealth *v.* Edgerly, 10 Allen, 184.
Stoudenmire *v.* Harper, 81 Ala. 242.

It would be an easy matter to protect from the inspection of the jury these pages of the memorandum book, and we submit that it is error not to have done so under the circumstances in this case.

VII. — (E. 11.)

The question put to the defendant, Edward Preble, whether his mother understood that the shares of Old Colony stock were her property (Record 15), ought not to have been allowed.

It is one of the most elementary principles of law that a witness should be allowed to testify only to facts which lie within his own personal knowledge.

1 Greenleaf, Evd. Sec. 98.

The fact inquired about here was his mother's "understanding" in regard to the stock in question, and in his answer he told what his mother "thought" and "understood" in regard to that property. Now we know from the nature of things that it was impossible that he should know of his own knowledge what his mother understood or thought; there is no way in which he could know what his mother thought or understood except from her declaration to him or his inference from her acts. To ask what she "understood" is to ask what she told him, which is pure hearsay and incompetent; or it is to ask for his opinion founded on his inference from certain other facts, which is equally incompetent, for all inference from other facts must be drawn by the jury alone.

The question is clearly incompetent under the rule laid down by Chief Justice Marshall: "Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge."

Mima Queen *v.* Hepburn, 7 Cranch, 290, at 295.
Hopt *v.* Utah, 110 U.S. 574.

The specific fact to which this witness was permitted to testify was susceptible of being proved by Mrs. Preble, who could speak from her own knowledge, and who was a witness in the case.

In Xenia Bank vs. Stewart, 114 U.S. 224, this court held a question to be incompetent because a responsive answer to it might include hearsay statements as well as facts within the personal knowledge of the witness.

In Conn. Life Ins. Co. *v.* Union Trust Co., 112 U.S. 250, at 256, the question, "Did you not understand from your husband the nature of the disease?" was held not to be a proper question, "Because," as Harlan, J., says at page 256, "if the statements of the insured to her were admissible upon the issue, . . . her statements of what she understood may not have been justified by what the insured actually said, and may have been nothing more than the unwarranted deduction of her own mind." In this case there is no doubt that his mother's statements to him are not admissible.

Therefore, we submit that this question calls for nothing but hearsay or mere conjecture, and is for that reason incompetent and ought not to have been allowed.

VIII. — (E. 12.)

The question put to Edward Preble in cross-examination (Record 15), "Were you in good standing financially among your acquaintances in the fall of 1879?" ought to have been admitted. It was a reasonable inquiry into the circumstances surrounding the stealing of the property in question, which was an important fact in the case, which had been fully testified to in the trial, and in regard to which the defendants ought to have been allowed reasonable latitude in the cross-examination of this witness.

It was material on another important issue in the trial, viz.: whether the defendants had reason to know or did know that the witness was at the time specified in straitened circumstances, and was selling any other property than his own. If his financial standing in the community was good, the de-

fendants would be less likely to have cause for suspicion, and there would be less grounds for drawing an inference that they knew that the property which he was selling through them was stolen property.

It was also a proper question as affecting the credibility of the witness, for an answer in the affirmative would tend to show that the witness was by nature dishonest and more ready to resort to dishonest methods than to honest ones to get himself out of any trouble. "A witness may always be subjected to a strict cross-examination as a test of his accuracy, his understanding, his integrity, his bias, and his means of judging."

Perkins *v.* Adams, 5 Met. 44.

IX. — (E. 14.)

The Court ought to have allowed the question put by the defendants to the witness, I. C. B. Walley, whether he heard the plaintiff say where and in whose possession the envelopes found in her box were (Record 16).

In her direct examination the plaintiff, as some evidence that the defendants had notice that the securities in the box were her property, testified that when she went to the box in 1882 she found the empty envelopes, and on these were written the name of the stock and the words, "The property of Sarah A. Preble." This was secondary evidence of said writing, and would not be admissible unless it was shown that the envelopes were lost, destroyed, or out of her control (Sebree *v.* Dorr, 9 Wheat. 558). To make this secondary evidence admissible, she testified that she did not know what had become of the envelopes. This testimony was therefore material, and it was competent for the defendants to contradict it by showing that a year before the trial she had stated where the envelopes were. The defendants laid the foundation for this contradictory testimony by calling her attention in cross-examination to her former statement (Conrad *v.* Griffey, 16 How. 38). As she would neither admit nor deny that she made this statement, it was proper for the defendants to put in evidence of it.

Payne *v.* State, 60 Ala. 80.
Sealy *v.* State, 1 Ga. 213.
Ray *v.* Bell, 24 Ill. 444.
Lewis *v.* State, 4 Kan. 296.
Chapman *v.* Coffin, 14 Gray, 454.
Nute *v.* Nute, 41 N.H. 60.
People *v.* Jackson, 3 Park. Cr. (N.Y.) 590.
Janeway *v.* State, 1 Head (Tenn.), 130.

This former statement of the plaintiff which the defendant sought to prove was in two forms — one oral and the other written. Of the oral declaration the best evidence was the testimony of one who had heard her make it. It was to prove her oral statement at the time of giving her deposition that the testimony of the witness Walley was offered, and it is submitted that the question put to him was proper and ought to have been allowed.

X. — (E. 15.)

The written declaration which contradicted her present testimony was contained in her written deposition signed and sworn to by her, and by her filed in the case. This declaration the defendants offered to prove by the best evidence that could be given, that is, the interrogatories and answers in the deposition embodying this declaration. But this evidence the Court rejected unless the defendants would offer the whole deposition, which the defendants declined to do, and the evidence was excluded (Record 16 and 17). The materiality of the evidence was admitted when the Court ruled that it was admissible provided the whole deposition was read. We contend that this evidence ought to have been allowed as offered. The defendants offered all the evidence in the deposition pertaining to the declaration which they wished to prove; if there was any other part of the deposition which in any way modified or explained what the defendants offered, it would have been the right of the plaintiff to read that also; but there is no rule of law requiring the defendant to put in the plaintiff's own statement of her whole

case, a great part of which may have been objected to and inadmissible, merely for the purpose of proving that she made one statement which has no connection with the rest of the deposition.

The correct rule is well stated in a very similar case in Lynde *v.* McGreggor, 13 Allen, 172, at 181: "The plaintiffs having put in evidence some of the answers of the defendant to interrogatories put to him upon his examination under the proceedings in insolvency, he had the right to read to the jury all his answers in the same examination which pertained to the same subject; and he was permitted to do so. He had not the right to put the whole examination in evidence, because that would be giving his own declarations in evidence in his own favor, upon matters upon which they had not been used against him."

The same rule is followed in Webster *v.* Calden, 55 Me. 165, where Appleton, C.J., says at page 170: "The tenants offered the answer of Joshua Gerry to the tenth interrogatory to a deposition taken in an equity suit, to contradict his statement made in a deposition in the present suit. The demandant then offered the balance of said deposition, which was excluded, except such parts as related to the subject-matter referred to in the answer to said tenth interrogatory, or such portions as might qualify that answer. This was undoubtedly correct."

So, it has been held generally that where part of a conversation, account, or other writing has been put in evidence as material to some question in the trial, this does not admit other parts of such conversation, accounts, or writings that do not relate to the same subject-matter.

Straw *v.* Greene, 14 Allen, 206.
Dole *v.* Wooldredge, 142 Mass. 161.
Ashley *v.* Wolcott, 3 Gray, 571.
Abbott *v.* Pearson, 130 Mass. 191.

We submit, therefore, that it was error to exclude the two interrogatories and answers in the plaintiff's deposition which was offered by the defendants.

XI. — (E. 16.)

The testimony of the witness, L. C. Southard, the junior counsel for the plaintiff (Record 17), was inadmissible, and ought to have been excluded.

Testimony such as that in question of prior statements made by a witness out of court consistent with or similar to the testimony given by him in his examination-in-chief, is clearly not competent as substantive proof of the truth of the statements, for it is purely hearsay. Its only purpose could be to support or strengthen the credibility of the witness, but it is a rule recognized in all courts that a party cannot give evidence in support of his own witness until that witness has been attacked.

Bryant *v.* Tidgewell, 133 Mass. 86.

It is accordingly held with almost equal unanimity that a party cannot for the purpose of supporting his witness introduce evidence of prior statements by that witness of the facts testified to by him at the trial, except when the witness has been impeached by the opposing party in a particular way.

Conrad *v.* Griffey, 11 How. 480.
U. S. *v.* Holmes, 1 Cliff. 98.
Com. *v.* Jenkins, 10 Gray, 485.
Deshon *v.* Merch. Ins. Co. 11 Met. 199.
Robb *v.* Hackley, 23 Wend. 50.
Reed *v.* Spaulding, 42 N. H. 114.
People *v.* Doyell, 48 Cal. 85.
Nichols *v.* Stewart, 20 Ala. 358.
Smith *v.* Morgan, 38 Maine, 468.

There are two exceptions to the general rule excluding former consistent statements of a witness: (1.) Wherever the counsel on the other side imputes to the witness a design to misrepresent, from some motive of interest or relationship, it is proper to show that the witness made a similar statement at a time when the supposed motive or interest did not exist.

(2) Where the other side, in cross-examination or otherwise, puts in evidence tending to show that the testimony is a fabrication of recent date, it is proper to show that the same account was given by the witness before its ultimate effect and operation arising from a change of circumstances could have been foreseen.

1 Phil. Ev. 307 Cowen's Ed.
1 Starkie Ev. 149.
Robb *v.* Hackley, 23 Wend. at 55.
Hewit *v.* Corey, 150 Mass. 445.
French *v.* Merrill, 6 N. H. 465.
People *v.* Doyell, 48 Cal. 85.
Hester *v.* Com., 85 Pa. St. 139.
Stolp *v.* Blair, 68 Ill. 541.
Stewart *v.* People, 23 Mich. 63.

It is clear that this case does not come within either of the exceptions. In the first place, the witness, Edward Preble, had no relationship or interest in the case at the time of the trial that he did not have at the time this statement was said to have been made to his mother's counsel, and there was no attempt on the part of defendants to show a design to misrepresent from any recent interest or relationship. In the second place, the defendants, neither in cross-examination nor otherwise, put in any evidence tending to show that the testimony about the writing on the bonds or the erasure of the same was a fabrication of recent date, and the effect of the cross-examination was to support rather than impeach him (Record 17). Therefore, according to a universally accepted rule of practice, the plaintiff could not introduce any evidence to support him.

There was no evidence put in by the defendants that the testimony in question was a fabrication of late date; the only thing tending to show that was the fact that the testimony was not put in at the proper time in the trial; therefore, whatever discredit attached to the witness in giving this testimony arose from the fact that the testimony was not offered by the plaintiff till after the defendant's evidence

was all in. The cross-examination rather lightened than added to this discredit; it involved him in no contradictions, it afforded him an opportunity to explain the cause of the delay in offering this testimony, and to put in his own testimony of his former statement, and his answers were not contradicted. He stood unimpeached by the defendants, and for that reason we contend, on the authority of the cases above cited and many more which might be cited, that it was error to allow this testimony to be put into the case.

XII. — (E. 18.)

We contend also that the record of the State court in the suit of Sarah A. Preble against these defendants ought to have been admitted (Record 17).

Although pleadings that consist of mere formal allegations, which may be presumed to have been made by the attorney without special instruction from the client, are not competent evidence to prove admissions against the person pleading, yet it has always been held that where the pleadings consist of specific allegations of matters of action or defence, such as allegations about specific pieces of property, they are competent evidence in another suit to prove admissions by a party or to contradict a witness.

Gordon *v.* Parmelee, 2 Allen, 212.
Bliss *v.* Nichols, 12 Allen, 443.
Johnson *v.* Russell, 144 Mass. 409.
Parsons *v.* Copeland, 33 Me. 370.
Green *v.* Bedell, 48 N. H. 546.

But not only were the pleadings in her prior suit offered, but also interrogatories filed in that suit, and her sworn answers thereto; these interrogatories and answers were clearly admissible for the purpose stated.

Williams *v.* Cheney, 3 Gray, 215.
Judd *v.* Gibbs, 3 Gray, 539.

One of the fundamental issues in the case was whether the property in suit was her property or that of her son (see As-

signments of Error, Nos. 23, 24, 28, and 29). The evidence offered was therefore material and went directly to the questions at issue. This record might have proved to be entirely consistent with the record of the case of Edward Preble, in that it would show that in 1883 Sarah A. Preble did not claim to be the owner of the securities for which her son brought suit in 1884, and it would further show that these securities constitute a large part of the property declared upon in this suit. We submit therefore that it was error to exclude this evidence.

XIII. — (E. 19, 20, 21, 25, 27, 30, 31, 32.)

1. The defendants asked the court to rule and instruct the jury in regard to their defence of the Statute of Limitations as follows: "1. Upon the evidence in this case the plaintiff cannot recover upon any transactions which were had between the defendants and her son before Jan. 25, 1881." (Record 32, Assign. 19.) The 3d, 4th, 7th, 8th, and 11th requests for rulings (Assignments of Error, 20, 21, 25, and 27) contain substantially the same request in regard to the conversion, at a particular date prior to Jan. 25, 1881, of each of the securities for which the plaintiff recovered. The defendants also asked the court to give the following instructions:

"14. The burden of proof is on the plaintiff in this case to show by a preponderance of evidence as to each cause of action upon which she relies that it accrued within six years before the date of the writ in this case.

"15. There is no evidence in this case upon which the jury would be authorized to find that there was any fraudulent concealment by the defendants from the plaintiff of any of the causes of action upon which this suit is brought." (Record 34. Ass. of Errors, 30 and 31.) All these requests the court refused, and the defendants excepted.

Inasmuch as the jury has found that all the securities were converted more than six years before the bringing of the suit (Record 5 and 51), these several causes of action were barred by the Statute of Limitations (Pub. Sts. Ch. 197, Sec. 1) unless they were fraudulently concealed from the plaintiff by

the defendant (Pub. Sts. 197, Sec. 14); so that these several prayers and the exception to the charge given on this point now present but one question of law, that raised by the refusal to grant the last request for instructions, namely: whether there is any evidence reported in this record upon which the jury would be authorized to find that there was any fraudulent concealment by the defendants from the plaintiff of the causes of action upon which the plaintiff recovered.

The provision of the Statutes of Massachusetts allowing a cause of action to be sued more than six years after it arose, wherever there has been fraudulent concealment, is in the following words: "If a person liable to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action." (Pub. Sts. 197, Sec. 14.) The question to be determined is whether there was proved in this case such a fraudulent concealment as is contemplated in this provision.

In deciding this question this court will adopt the construction put upon the statute by the Massachusetts courts: "No laws of the several States have been more steadfastly or more often recognized by this court from the beginning as rules of decision in the courts of the United States than Statutes of Limitations of actions real and personal as enacted by the legislature of a State and as construed by its highest court."

Gray, J., in Bauserman *v.* Blunt, 147 U.S. 647.

This statute has several times been the subject of consideration by the Supreme Court of Massachusetts, and three facts in regard to its construction are now well settled in that court: 1st. That where there is no fiduciary relation between the parties, mere silence of the defendant or his failure to inform the plaintiff of the cause of action is not such a fraudulent concealment as is contemplated by the statute; a mere

constructive fraud is not enough, some positive act of concealment must be proved.

Walker *v.* Soule, 138 Mass. 570.
Nudd *v.* Hamblin, 8 Allen, at 130.
Atlantic Nat. Bank *v.* Harris, 118 Mass. 147.
Manf. Nat. Bank *v.* Perry, 144 Mass. 313.

2d. That there is no concealment if the plaintiff possesses the means of acquiring knowledge of the facts. "When he would take advantage of the exception which gives him a further time in case the cause of action has been fraudulently concealed from him, yet, if he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment by others."

Nudd *v.* Hamblin, 8 Allen, 130, at 133.

3d. That the fraudulent concealment must be that of the defendant and not of some third person.

Abbott *v.* Inhab. of No. Andover, 145 Mass. 484.

These decisions are in accord with the decisions of this court and of other State courts where similar statutes are in force. In construing a statute of the State of Indiana, almost identical with that of Massachusetts, this Court has said in Wood *v.* Carpenter, 101 U. S. 135, at 143:

"A wide and careful survey of the authorities leads to these results:

"The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation.

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

"There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.

"The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown

to be consistent with the requisite diligence." See to the same effect —

Stanley *v.* Stanton, 36 Ind. 445.
Wynne *v.* Cornelison, 52 Ind. 313.
Stone *v.* Brown, 116 Ind. 78.
Miller *v.* Powers, 119 Ind. 79.
Rouse *v.* Southard, 39 Me. 404.
Boomer *v.* French, 40 Iowa, 601.
Evans *v.* Montgomery, 50 Iowa, 325.
Sankey *v.* McElevey, 104 Pa. St. 265.

"The fraud must be the fraud of the party setting up the bar of the statute."

Pratt *v.* Northam, 5 Mason 95, at 112.
Chamberlain *v.* R.R. Co. 27 Fed. R. (C.C. Mo.) 181.
Stevenson *v.* Robinson, 39 Mich. 160.

In the case at bar there is not a particle of evidence that either of the defendants either said or did anything, at any time, before or after the securities came into their possession, to conceal the causes of action from the plaintiff. There was no claim that Mr. Bates knew anything about these transactions; Edward Preble could not say that he ever spoke to Mr. Bates about them. (Record 26.) If there was any concealment by either of the defendants, it must be by Mr. Walley, and, inasmuch as the plaintiff has not intimated by a single word that anybody concealed anything from her or that she ever spoke to Walley till she discovered in 1882 that her securities were all gone, and as Walley himself denies all knowledge of the fact that he had converted her property, if there is any evidence of concealment by Walley anywhere in the case, it must be found in the testimony of Edward Preble; but a careful reading of the whole testimony of Edward Preble fails to disclose a single intimation that Walley ever did conceal anything from the plaintiff; on the contrary, Preble says (Record 27): "Mr. Walley called at my mother's house with me; he

never spoke to her in my presence about business that I recollect."

If there is any evidence of fraudulent concealment of the causes of action by any one, and we fail to find any, it certainly is not a concealment by either of the defendants, and is, therefore, not the fraudulent concealment contemplated by the statute.

Abbott *v.* North Andover, 145 Mass. 484.
Pratt *v.* Northam, 5 Mason, 95.
Chamberlain *v.* R.R. Co. 27 Fed. R. 181.
Stevenson *v.* Robinson, 39 Mich. 162.

It is charged, however, in the replication which the plaintiff was allowed to file toward the end of the trial, that "the defendants, by themselves and their confederates, fraudulently concealed said cause and causes of action" from the plaintiff (Record 5); and the justice who presided at the trial gave this instruction to the jury: "If from the evidence you believe that Walley, one of the defendants, conspired with young Preble to obtain these bonds, and afterwards to conceal the fact from the mother, he, Edward, having the key to the safety box containing the securities, this would be evidence going to prove a fraudulent concealment of the cause of action, such as would bring it within the exception of the statute." (Record 36.)

If there is any evidence of such conspiracy it is to be found in the testimony of Edward Preble alone. We will now quote from Edward Preble's testimony everything that can have any bearing on this question.

"The first certificate or security was taken out, if I recollect rightly, sometime in the winter of 1879 or 1880. . . . I had been speculating through the advice of Mr. Walley, I had lost everything I had. Bates Walley told me that I was in debt to them, and he suggested, "Why don't you go into the New York market, Ned?' Then he says, 'All you have to do will be to get one of those Minneapolis bonds and shove it up as margin; you don't have to sell it, and we will hold it to make up this balance and pay it back, and in that

way you will get out of it all whole.' I went over all alone and took one of the bonds; it was a coupon bond, and brought it over to him and gave it to him; I don't know what he did with it; he said he was going to use it as a margin on some New York stock, if I remember rightly." (Record 22.) . . . In cross-examination: "At the time I took my mother's first bond, I don't know whether I was indebted to them or not. I was told I was indebted, but not the extent of it. I was told that I was in debt by Mr. Walley, in his office; nobody else was present. I cannot fix the date, except that it was in the fall of 1879. Mr. Walley then informed me that I was in debt to his firm. I told him that my money was all gone. He said, 'Why don't you try the New York market?' I said, 'I have no money.' He said, 'All that you have to do is to go over and get a Minneapolis bond and bring it over here and we will put it up as margin and we will make the indebtedness up, and then the bond will come back and you can put it back in the safe.' That is the whole of what was said to me. I am using the words he used. (Record 24.) . . . To the best of my recollection I hadn't taken any Minneapolis bonds to Bates & Walley before the fall of 1879. I had no conversation with Mr. Bates Walley on the subject of taking one before the fall of 1879, that I know of. I didn't, to my recollection, begin to pilfer from my mother before that time. (Record 25.) . . . I don't know whether I ever spoke to Mr. Bates, the senior member of the firm, on the subject of disposing of these stocks and bonds; Mr. Walley was usually the man with whom I had conversation. I never called Mr. Bates' attention to the fact that it was my mother's, and not my own. I had no other conversation with Bates Walley or with Mr. Bates in relation to taking the property of my mother from her box, except what I have already testified to in this case, that I recollect of. I communicated to no person, to my recollection, in 1880 or 1881 or 1882, before the time when I was arrested, that I was taking from my mother's box, without her knowledge and consent, her property, and disposing of it on my own account. (Record 26.) . . . At some time I

might have gone across State street and got the bonds from my mother's safe without having been requested to do so by anybody, but I could not tell what securities I went and got on my own account for sale." (Record 27.)

We submit that there is nothing here to justify the jury in finding that Walley had conspired with Preble to conceal the fact of taking the securities. Every word of this testimony is consistent with the contention of the defendants that they believed that the Minneapolis bonds belonged to Edward Preble. The only evidence that they had any knowledge of Mrs. Preble's title to them is the fact that Walley had access to the box in the safety vaults in 1877, two years before, and that the envelopes in which they were kept were said to contain the words, "The property of Sarah A. Preble." But it is a significant fact that although Edward Preble has repeated this conversation twice in his testimony and says he has given the whole of it, "using the exact words he used" (Record 24), no mention is made in it of Mrs. Preble or any suggestion that it is her property, and it is also very significant that the plaintiff herself has entered in her own account in the memorandum book which was put in evidence only seven Minneapolis bonds, and that she has put in her son Edward's account one Minneapolis bond (Record 41 and 43); so that this conversation which Edward Preble testifies was the only conversation he ever had with Mr. Bates or Mr. Walley in relation to taking his mother's property, may and very likely did refer to his own Minneapolis bond. But what ever it referred to it is to be noticed that there is not a word in it about concealing anything from any one; nor is there in the whole case any word spoken by or to Walley or any act done by him suggesting concealment, nor anything to show that he knew that Edward Preble was concealing anything from the plaintiff, or that the plaintiff did not go to her box from time to time during these years. So far as Bates Walley knew, mother and son were living together on terms of the greatest intimacy. Appearances showed that all that she had was at his disposal. It was impossible to tell what was hers and what was his, and to know or suspect that what

had been hers had not become his by her full consent. "She never refused him anything."

As there is no evidence in the case that Walley knew that the causes of action were concealed from Mrs. Preble, or that he ever authorized or suggested such a concealment, we submit that there is no evidence to justify a jury in finding that he conspired with Edward Preble, or with anybody else, to conceal the causes of action from the plaintiff.

Furthermore, as we have shown above, there is no concealment if the person seeking to avoid the Statute of Limitations possesses the means of acquiring knowledge of the facts. "If he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment of others." There must be reasonable diligence; and the means of knowledge are the same as knowledge itself.

Did Mrs. Preble have the means of acquiring knowledge of the facts? She certainly had, for all that was required to gain complete knowledge was to examine her securities in the box; during all the time that her securities were being stolen, she either had the key to her box or had allowed her son to keep it, and for aught that appears, could have had it from him at any time upon asking for it (Record 18 and 23); and all this time she was living in Boston, or within easy reach of it. At no time in 1879, 1880, or 1881, did the defendants have any access to her box, or any control over it, or any power of influencing her action in examining or not examining it.

Did she use that reasonable diligence in keeping herself acquainted with the condition of her property required of a person who seeks to set up fraudulent concealment by others? We submit that she did not, and that her failure to discover the stealing of her property was due solely to her own negligence and laches.

From 1878 till 1882, when her son was arrested, she never went to her box in the safe deposit vaults. She gave her son the key to her box and entire control of her property, and all the business of collecting interest coupons, selling

securities, and buying new securities, was done through him. At first, when he wanted to cut off coupons, he used to get the key from her and again return it to her, but after a time he ceased to return it, and she does not appear to have asked for it. (Record 23.) She knew during these years, 1878 to 1882, that he was engaged in stock speculations (Record 19); he told her he was. She knew that he was living extravagantly, and spoke to him about it, and he told her he was making money out of speculations. (Record 25 and 26.)

Yet, notwithstanding this knowledge on her part of his extravagant habits and hazardous speculations, she gave him the key to her box whenever he asked for it, without asking any questions. When he got the key from her for the purpose of stealing her first bond, she did not require him to state the purpose or give any reason. (Record 24.) She loaned him a $1,000 bond without knowing for what purpose. (Record 32.) Whenever her signature or authority was required for the sale of any of her property, it was always to be had by him for the asking; she signed the power of attorney on the back of the certificate of Old Colony stock to enable him to dispose of that, and she never received anything for it in return. (Record 20, 22, 24, 26.) She had no personal knowledge about the sale of the Old Colony stock, except that she gave the certificate indorsed to her son. (Record 20.) She gave him a power of attorney to transfer the U. S. bonds (Record 20 and 22); she signed an order to draw out $350 from the Provident Institution for Savings and handed the book over to her son. (Record 21 and 23.) The other securities were transferable on delivery, and he had no need to trouble her to get authority to dispose of those. She could not tell when or for how long a time she received the interests or dividends on any particular security, because he simply gave her money whenever she wanted it; she left to him all the dividends and interest which she did not herself need, and when she wanted money he brought it to her. (Record 20). He never paid her any money other than in paying her board and expenses. (Record 27.) She didn't

remember ever having denied any request that her son ever made to her. (Record 32.)

There certainly could not be a more complete and reckless abandonment of all her property and interest into the hands of another. She gave him all the muniments of title, made him to all intents and purposes the owner, so that no act or deed was necessary to make him the absolute owner except to speak the words, "I give." Yet she knew all this time that the person to whom she had thus abandoned entire control and possession of her property was young (24 years of age), without experience in business, was living extravagantly, and engaged in stock speculations. To rest content for three years under such circumstances without making any examination to see how her property stood, is, we submit, not the vigilance required of a person who seeks to avoid the bar of the Statute of Limitations; it is not reasonable diligence, but gross carelessness.

2. We submit that the part of the charge in which the Court states what is meant by fraudulent concealment of the cause of action (Record 36) is erroneous and misleading. The instructions were given in the alternative stating the circumstances which would justify the jury in finding that there was not, and circumstances that would justify them in finding that there was fraudulent concealment. That part of the definition which states the circumstances under which the jury would be justified in finding that there was no fraudulent concealment is as follows:

"Now, gentlemen, I shall charge you, as matter of law, this: That if you believe that the defendants here were not guilty of fraud in these transactions, if you believe that they took these negotiable securities in, if you please, the ordinary course of their business and sold them, then Mrs. Preble would not have a right in this case to bring suit for anything that took place prior to January, 1881. . . . So that, gentlemen, whether there was fraudulent concealment of the transaction, such as would make Mrs. Preble's whole claim good here, turns upon the question whether you

believe from the evidence which has gone in before you that the defendants here acted in the ordinary course of their business, or whether," etc.

From this language the jury must have understood that the defendants, in order to avail themselves of the defence of the Statute of Limitations, would have to show that in dealing with these securities they acted in good faith and in the ordinary course of their business; in other words, inasmuch as the securities were negotiable upon delivery, that there was no cause of action against them. This is the clear meaning of the language, and it is too clearly erroneous to need further comment.

The other part of the definition, in which the Court undertakes to state what circumstances would constitute fraudulent concealment, is equally erroneous. It is in substance this: If Walley, one of the defendants, conspired with Edward Preble to obtain these bonds and afterwards to conceal the fact from the plaintiff, Edward Preble having the key to the box containing the securities, so that the plaintiff with great difficulty could obtain access to it or knowledge as to whether those securities existed or not, this would be evidence going to prove fraudulent concealment of the cause of action such as would bring it within the exception to the statute.

There is not a word as to the necessity of proving actual concealment by either of the supposed conspirators, or whether the difficulty in which the plaintiff is assumed to have found herself in gaining access to her securities was the result of her own acts or of those of either of the conspirators. The charge amounts to this, that if two persons conspire to conceal a cause of action this is sufficient evidence that they did conceal it; that an expressed intention to do a thing is the same as doing it. This would not be a correct statement of law, even in an action of conspiracy; it is much farther from the truth in an action for conversion.

The Court assumes as a fact, or allows the jury to find, it is not clear which, that it was difficult for the plaintiff to gain access to her securities, but we have already shown that

there is no evidence of such fact. We have shown, on the contrary, that she never made any attempt to examine her securities during these years. She gained access to them when her son had the key in Europe. He kept the key during 1880 and 1881 because she allowed him to do so, but there is no evidence that he ever refused to return it to her. So far as the evidence goes, he never refused her anything; the only thing she ever asked for was money, and that he gave her, as much as she wanted. (Record 20.) He hired a carriage for her to ride in. (Record 27.) She could easily have ridden to the safe deposit vaults; there is no evidence that he ever prevented her from doing so; there is no evidence that he ever placed any obstacle in her way to prevent her from going to her box in the safe deposit vaults. In her own words "He was always a very affectionate boy, and that had continued all the time down to to-day." (Record 21.)

We submit that this charge is not a correct statement of the law applicable to this case, and is misleading.

XIV. — (E. 23.)

The sixth request for instructions (Record 33) ought to have been granted. Upon the evidence in this case the plaintiff never became the owner of the three Oregon Navigation Company bonds. The plaintiff testified that twenty-eight hundred dollars of four per cent. United States bonds were changed into Oregon Navigation 6's; she gave her power of attorney to transfer the United States bonds to her son; they were registered bonds (Record 20); she does not say that the United States 4 per cent. bonds went into the hands of the defendants, the only thing she knew about it was that she gave them to her son; he transacted all her business. Edward Preble's testimony in regard to the U. S. 4 per cent. bonds is: "My mother gave me a power of attorney in 1879 for the purpose of selling United States bonds; with the proceeds of the sale of those bonds I suppose Eastern Ill. R.R. Co. 6 per cent. bonds were purchased. I never saw

the Eastern Illinois bonds. (Record 22.) I think the United States bonds were sold some time in 1881 or 1882." (Record 26). No evidence by either that they went into the hands of the defendants. The defendants deny that they ever had these U. S. bonds from Edward Preble or sold them for him. (Record 31.) So the uncontradicted testimony in the case is that the defendant had nothing to do with the sale of the $2,800 U. S. 4 per cent. bonds, and if the proceeds of those bonds were used to buy the Oregon Navigation bonds, the defendants had no notice of that fact, for they were not the parties who sold them. Moreover, it is to be noted that in her memorandum book the United States bonds and Oregon Navigation bonds are entered as though they were held at the same time. (Record 42 and 44.)

Edward Preble testified that his mother's Old Colony stock was changed into Oregon Navigation bonds or Eastern Illinois bonds. " I don't recollect which " (Record 24) ; but it cannot be held on this testimony that Old Colony stock was changed to Oregon Navigation bonds against the positive testimony of the plaintiff (Record 18) ; and of the defendants (Record 30) ; that the proceeds of the twenty shares of Old Colony stock were used to buy Eastern Illinois bonds. Besides, in her memorandum book, we find the Government 4 per cent. bonds and the Eastern Ill. bonds upon her account at the same time. (Record 42, 43, and 44.)

The testimony, then, of the defendant Walley, that he bought and sold for Edward Preble " three thousand dollars Oregon Navigation 6 per cent. bonds in October, 1880, and that those were bought in New York and never came to Boston ; that the defendants never saw them ; that they were subsequently sold by Edward Preble's direction ; and that no instructions were given, either at the time of purchase or the time of sale by Edward Preble, except to buy them and to sell them for his account " (Record 30), must be taken to be uncontradicted by any evidence in the case. Edward Preble corroborates the testimony of the defendants that these bonds were bought for his account, and not for his mother, for he says, " They were purchased because Mr. Walley told

me that they could not hold the stock against my indebtedness, but could hold a bond." (Record 24.) As the bonds were not bought for her account, but for Edward Preble's account, we submit that whether the money with which they were bought was hers or not, as they never came into her possession, and were never charged to any account than that of Edward Preble's, she never became the owner of them. And the sixth request for instructions ought to have been given.

XV. — (E 24.)

The seventh request for instructions ought to have been given (Assign. of Errors, 24). We have seen in the argument under the preceding point that the statement of facts embodied in this request was supported by the uncontradicted evidence in the case. All that is necessary for us now to contend is that the jury would have been justified in finding that these were the facts in regard to the Oregon Navigation Company 6 per cent. bonds. If the jury should find these facts, it is too clear to need any argument that the plaintiff never had any title or right to the immediate possession of these bonds that would support her action, and that there was no conversion of these bonds by the defendants. The facts in regard to the purchase and sale of these bonds were entirely distinct from the facts in regard to the other securities, and we contend that we had a right on that account to a separate instruction in regard to them; and we contend further that the substance of our request for instruction was not covered by anything that was given in the judge's charge. The judge's charge is exclusively applicable to securities which had been in the possession of the plaintiff and had "passed through the hands of Edward Preble into the hands of the defendants;" but these securities had never been in the hands of Edward Preble, or even in the hands of the defendants, and there is nothing in this charge applicable to that state of facts.

were coupon bonds; my name was written on them. . . . They were my bonds with my name on them. I kept my securities in the Union Safe Deposit vaults in the same box that my mother had. My property was eighty-five hundred dollars State of Maine bonds and that was all" (Record 23; see also Record 41).

If the jury should find that the defendants in "October, 1879, purchased for the account of Edward Preble, and by his direction, four New York & New England 7 per cent. bonds, of the par value of one thousand dollars each, and delivered said bonds to said Edward Preble." (Record 33), and it is difficult to see how they could find otherwise on the evidence, all the evidence in the case goes to show that they were purchased with Edward Preble's own money, and never were the property of Mrs. Preble; therefore the defendants are not liable for any of them to the plaintiff, because, in the first place, there is no evidence that they sold them, but all the evidence goes to show that they purchased them and delivered them to Edward Preble, who ordered them bought; and in the second place, because all the evidence tends to prove that they belonged to Edward Preble, and not to the plaintiff, so that they had a right to do anything with them that he might direct.

XVII. — (E. 29.)

The thirteenth request for instructions ought to have been given. We have already shown that on the evidence in the case the plaintiff is not entitled to recover for four out of the six bonds mentioned in defendant's testimony. We submit that on the evidence she is not entitled to recover for the other two bonds, those sold by defendants, for there is no evidence in the case that she ever owned them. The only thing bearing a semblance of proof that she ever owned any New York & New England bonds is the meaningless entry of "2,000 N.Y. & N. Engl. B." in her memorandum book, but the same account (2d leaf, 1st page) contains an entry, "5,500 N.Y. & N. England, Edw.," which, if it means anything, means that Edward Preble, in 1879, owned $5,500 New

York & New England bonds, and they seem to have disappeared about that time. There is no evidence that the $2,000 bonds sold by defendants were those of the plaintiff; and if they were, there is no evidence that the defendants had notice of that fact, for they were never in the box when Walley had control of it.

Therefore, we submit that there was no evidence on which the plaintiff was entitled to recover for any of the New York & New England bonds sued on, and the thirteenth request for instructions ought to have been given.

XVIII — (E. 33 AND 34.)

Therefore we submit that the verdict in this case was erroneous, and that judgment ought not to have been entered for the plaintiff.

SAMUEL HOAR,
Counsel for Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 123.

HENRY M. BATES AND J. C. BATES WALLEY,

PLAINTIFFS IN ERROR,

v.

SARAH A. PREBLE.

BRIEF FOR SARAH A. PREBLE,

PLAINTIFF, DEFENDANT IN ERROR.

ROBERT M. MORSE,
LOUIS C. SOUTHARD,
for SARAH A. PREBLE, *Plaintiff, Defendant in Error.*

LAW ASSOCIATION
OF
PHILADELPHIA

Supreme Court of the United States.

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No. 123.

HENRY M. BATES AND J. C. BATES WALLEY,
Defendants, Plaintiffs in Error,
v.
SARAH A. PREBLE.

BRIEF FOR SARAH A. PREBLE, *Plaintiff,*
Defendant in Error.

Statement of Facts.

This action was brought by Mrs. Sarah A. Preble the original plaintiff, to recover of the defendants, Bates and Walley, stock brokers, the value of certain securities the property of the plaintiff which she alleged had been converted by the defendants to their own use.

Mrs. Preble, a widow and a resident of Portland, Me., acquired by her husband's will certain securities consisting of stock and bonds which she kept in a box in the Union Safe Deposit Vaults, Boston. She claimed at the trial and offered evidence tending to prove that at various times between 1878 and 1882 her son, Edward Preble, a young man who had been entrusted by her with a key of the box, had abstracted the securities and had used them in speculations through the defendants Bates and Walley and that the latter represented by Walley, one of the defendants, conspired with young Preble to obtain the securities, and afterwards to

conceal the fact from his mother and that the defendants sold and used the securities with knowledge that they belonged to Mrs. Preble and that they were stolen from her.

The defendants denied these allegations and the issues of fact were submitted to a jury who found for the plaintiff. The defendants filed several motions for new trial on the ground that the verdict was against the evidence, and weight of evidence and for newly discovered evidence, but the court overruled the motions except that it ordered the plaintiff to remit a part of the verdict on account of certain errors made by the jury. Judgment was entered for Mrs. Preble April 5, 1890, for $28,496.52 being the amount of the verdict ($34,772.88), less the amount remitted as above stated, ($6,275.26.)

The plaintiffs in error assign thirty-four errors and prayers for reversal of the judgment most of which are based upon rulings on evidence. For convenience of argument they may be classified as follows: —

1. The admission of testimony as to the plaintiff's instructions to her son in reference to the the care of the property (errors 1, 2, 3, 10, 11).

2. The exclusion of a conversation between Mrs. Preble and her counsel (error 4).

3. Exclusion of evidence relating to a suit brought by the plaintiff in the State court against the defendants (errors 5, 6, 18).

4. Admission of Mrs. Preble's memorandum book and permitting it to go to the jury under certain instructions (errors 7, 8, 9).

5. Exclusion of two interrogatories and answers in the plaintiff's deposition (error 15).

6. Exclusion of certain questions to Edward Preble (errors 12, 13) and of record of suit by Edward Preble against the defendants (error 17).

7. Exclusion of evidence of defendant Walley as to certain statement of Mrs. Preble (error 14).

8. Admission of evidence of plaintiff's counsel Southard, as to statements by Edward Preble to him (error 16).

9. Rulings as to statute of limitations (errors 19, 20, 21, 25, 27, 30, 32).

10. Refusal to rule that there was no evidence to authorize a verdict for Mrs. Preble for certain parts or any part of her claim (errors 22, 23, 24, 28, 31, 33, 34).

The defendant in error submits that the Court ruled correctly upon all of these points and that the judgment should not be reversed.

I.

The admission of testimony as to the plaintiff's instructions to her son in reference to the case of the property (errors 1, 2, 3, 10, 11).

The plaintiff's case was based on the claim that her son had no right to use the securities, and that in entrusting to him the key of her box she did not give and did not intend to give him such right.

It was competent to prove by parol the instructions which she gave to him. It was the direct proof of his agency and of its limitations.

> Story on Agency, § 54.
> Costing *v.* Fisher 46, Mo. App. 603.

Mrs. Preble was therefore rightly permitted to testify (Rec. page 13), that she sent her son from California to Boston in 1876, and told him to take charge of her property and to place it in the safe deposit vaults (error 1); also that he reported to her that he had done this (Rec. page 13) (error 2); also that she did not authorize the sale of her securities. (Rec., page 13.) (Error 3.)

It was equally competent to show by testimony of Edward Preble that his mother instructed him to put the securities into the vaults. (Rec., page 15.) (Error 10.)

11. The ~~tenth~~ error relates to the admission by the court of the testimony of Edward Preble, that ten shares of stock in the Old Colony Railroad Company which stood in his name were understood by his mother to be her property.

It is to be noted that this stock is not included in the securities for which Mrs. Preble seeks to recover in this action, and it is impossible to see how the admission of the question, even if incompetent, could have prejudiced the plaintiff in error.

Edward Preble had testified without objection (Rec., page 15) that Walley went with him to the Provident Institution of Savings in which his mother had an account to her credit, that he drew out the same on an order from her and that he paid the proceeds to the plaintiffs in error for the purchase of the Old Colony stock, certificate of which was taken in his own name. The material value of this evidence which went in without objection was in showing that the plaintiffs in error knew that Mrs. Preble's money was used in the purchase of the stock.

The inquiry which followed and was objected to, related to the understanding which Mrs. Preble had of the transaction, and was equivalent to asking as to what the agent reported to his principal. He said in effect "I told her that though the certificate stood in my name it was her stock, and she so understood it." The question was competent, although as above stated, it would appear to have been quite immaterial.

II.

The exclusion of a conversation between Mrs. Preble and her counsel (error 4).

The fourth error is to the refusal of the Court to permit the

plaintiffs in error, on cross examination of Mrs. Preble, to ask her whether she had stated to her counsel in the suit the amount of her claim.

That the communications between client and counsel are privileged, is elementary law.

Vogal *v.* Gruar, 110 U. S. 311.
Whiting *v.* Darney, 30 N. Y. 330.
Foster *v.* Hall, 12 Pick. 89.
Hunt *v.* Blackburn, 128 U. S. 464.

And it is not a sufficient answer that the client took the stand as a witness.

Duttenhofer *v.* State, 34 Ohio St. 91.
~~Armstrong *v.* People, 70 N. Y. 38.~~
Bigfel *v.* Rayber, 43 Ind. 112.

Woburn *v.* Henshaw, 101 Mass. 193 is in conflict with the weight of authority on this point.

The fact that the client has called his legal adviser as a witness is not a waiver of the privilege.

Montgomery *v.* Pickering, 116 Mass. 227.

But even if the question was competent the defendants were not prejudiced by its exclusion. It was wholly immaterial as to whether she had or had not stated to her counsel the amount of her claim. Moreover it was within the discretion of the Court to limit the cross examination on collateral matters.

III.

Exclusion of evidence relating to a suit brought by the plaintiff (Mrs. Preble) in the State court (errors 5, 6, 18).

The fifth error assigned is that the Court refused to permit plaintiffs in error in cross examination of Mrs. Preble to ask her "if she intended to prosecute her prior suit in the State court against the same defendants."

This question was clearly inadmissible. If the pendency of another suit for the same cause of action in the State court was material to the defence of this action, the fact was in evidence (Rec., page 14) and the plaintiffs in error had the benefit of it. But Mrs. Preble's intentions as to prosecuting it were immaterial.

The same considerations apply to the sixth error assigned.

The eighteenth error related to the exclusion by the Court of the record of the suit in the State court which was offered "for the purpose of showing that in 1883 she claimed to be the owner of a small portion only of the securities sued for in the case at bar and that said suit was still pending and for the further purpose of contradicting the plaintiff"

Where evidence which is offered for a particular purpose only is not admissible for that purpose and is properly excluded, its exclusion is not error, although if offered for other purposes it might have been competent.

Brown *v.* Leach, 107 Mass. 364.
Britton *v.* Worcester County, 123 Mass. 309.

Here the fact that Mrs. Preble had brought a prior suit against the same defendants for the same cause of action, and that that suit was then pending was admitted by Mrs. Preble on cross examination (Rec. page 14), so that plaintiff in error was not prejudiced by the exclusion of the record on that ground.

But the purpose of the inquiry was to contradict Mrs. Preble and it is settled that under the statutes of Massachusetts (Pub. Stats., Chap. 167, § 75), the pleadings in an action in which judgment has not been rendered are not evidence.

Walcott *v.* Kimball, 13 Allen, 460.
Phillips *v.* Smith, 110 Mass. 61.
Taft *v.* Fiske, 140 Mass. 250.

A complaint in one suit not under oath or signed by the plaintiff but only by his attorney is incompetent in another suit to prove an admission by the plaintiff.

Delaware County *v.* Diebold Safe Co., 133 U. S. 473.

IV.

Admission of Mrs. Preble's memorandum book and permitting it to go to the jury under certain instructions (errors 7, 8, 9).

The portions of the book upon which the plaintiff relied were a page from an earlier memorandum book which was pinned into the book produced, and the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth leaves and page marked "X," all of which were in the handwriting of the plaintiff. The entries were original entries, and the fair interpretation of the report of the evidence is that they were made in the several years which they purport to cover. (Rec., pages 14, 15.) (Exhibit A, Rec., pages 38–46.)

These memoranda were simply schedules of the securities in her box from 1877 to 1882. They were supplemented by the oath of the plaintiff that they were her original entries and that they were correct. It must be presumed by this court that the appearance and character of the plaintiff's book indicated to the satisfaction of the judge at the trial that it was kept honestly, carefully and accurately.

That books of account containing original entries and supplemented by the testimony of the party who kept them, are admissible in evidence is well established in the courts of the United States, of Massachusetts and of the states generally.

Insurance Co. *v.* Weide, 9 Wall. 677.
Coggswell *v.* Dolliver, 2 Mass. 217.
Prince, Adm'r *v.* Smith, 4 Mass. 454.

Smith *v.* Sanford, 12 Pick. 138.
Harwood *v.* Mulry, 8 Gray, 250.
Pratt *v.* White, 132 Mass. 477.
Miller *v.* Shay, 145 Mass. 162.
Passmore *v.* Passmore, 60 Mich. 463.
Singer *v.* Brochamp, 33 Minn. 501.
Webster *v.* Clark, 30 N. H. 245.
Merril *v.* Ithaca R. R. Co., 16 Wend. 586.
Dunn *v.* Jarvies, 62 How. Pract. 307.
Payne *v.* Hodge, 7 Hun. 612.

A book kept by a bank, containing entries of notices to makers and indorsers of notes, accompanied by the testimony of the clerk who kept the same, is admissible.

Shove *v.* Wiley, 18 Pick. 558.

See also

Bank *v.* Boralf, 1 Rawle, 152.

Sheets of paper on which separate entries have been made have been received.

Hooper *v.* Taylor, 39 Me. 224.
Smith *v.* Smith, 4 Harr. 532.
Taylor *v.* Tucker, 1 Ga. 231.

Papers not evidence *per se*, but found to have been true statements of fact, are admissible in connection with the testimony of a witness who made them.

Ins. Co. *v.* Welden, 14 Wall. 375.

In many States notes of testimony or of conversations, accompanied by the testimony of the person who made the memoranda, have been admitted on similar grounds to those on which the competency of books of account rests.

People *v.* Murphy, 45 Cal. 137.
Mineral Point R. R. Co. *v.* Keep, 9 Ill.

Laban *v.* Crane, 56 Mich. 585.
Halsey *v.* Sinsebaugh, 15 N. Y. 485.
Clark *v.* Vorce, 15 Wend. 194.
Huff *v.* Bernet, 4 Sand. 120.
Jones *v.* Ward, 3 Jones, 24.
McAdams Exo'r *v.* Stilwell, 13 Pa. St. 90–90.
Glass *v.* Beach, 5 Vt. 172.
Marsh *v.* Jones, 21 Vt. 378.
Haven *v.* Wendell, 11 N. A. 112.

But it is unnecessary for the purposes of the case at bar to determine how far memoranda made by a party are admissible in evidence. The entries in the present case are of a character and made at times which rendered them competent.

If, however, the memoranda were not admissible the defendant was not prejudiced by their admission.

1. As was said by Morton, C. J., in Miller *v.* Shay, 145 Mass. 164, "The plaintiff had clearly the right to use his account book to refresh and aid his memory. The fact that the book went to the jury could not prejudice the defendant."

2. The schedule, annexed to their verdict by the jury (Rec. page 5), shows that, of all the securities mentioned on the various pages of the plaintiff's book, the only ones on which the verdict was based were eight Minneapolis bonds of $1,000 each, one Eastern Illinois bond of $1,000, three Oregon Railroad Navigation bonds of $1,000 each, five Chicago Sewerage Loan bonds of $1,000 each and two N. Y. & N. E. R. R. bonds of $1,000 each, and from the amount reckoned on this basis the plaintiff remitted in accordance with the opinion of the Court the amount allowed for one of the Chicago Sewerage bonds and for one of the Minneapolis bonds (opinion of Colt, J., Rec., page 50).

The defendant's ninth error alleged is to the ruling of the Court, permitting the rest of the plaintiff's book to go to the jury without sealing up the same so that it could not be examined by the jury. (Rec., page 15.)

It is to be presumed that the Court found that it was not practicable to seal up the rest of the book without impairing the use to be made of the leaves which were in evidence.

At all events it was within the discretion of the presiding judge to send the book to the jury after instructing them not to examine the parts which were not in evidence. It will be presumed that the jury followed these instructions.

An examination of the part of the book not admitted in evidence (Exhibit B., Rec., pages 46, 47), shows that there was nothing contained therein, even if it had been read by the jury, which could have predudiced the defendant unless it was the statement as to the plaintiff's dislike of the defendant Walley. But she had testified fully as to the facts on which this feeling was based. (Rec., page 18.)

But it is well settled that a paper which is in part legal evidence and in part not, may go to the jury if they are instructed to disregard the part which is not evidence.

Commonwealth *v.* Wingate, 6 Gray., 485.
Commonwealth *v.* Dow, 11 Gray, 316.

V.

Exclusion of two interrogatories and answers in the plaintiff's deposition (error 15).

The plaintiff testified personally at the trial. On cross examination she was asked whether when she gave her deposition, which had been filed and opened, she had not made certain statements, and she answered that she had made such statements. (Rec., page 16).

The defendants subsequently offered to put in these interrogatories and answers, but the Court excluded them unless they would offer the whole deposition, which they declined to do.

It is not stated that these answers were offered for the purpose of contradicting the plaintiff. On the contrary it must be assumed that they were in accord with her evidence as given orally, and of this the defendants had the full benefit.

Unless it appears affirmatively that the defendants were prejudiced by the exclusion of this evidence they have no ground of exception.

Smith *v.* Collins, 115 Mass. 388.
Boston & Maine R. R. *v.* Montgomery, 119 Mass. 114.
Morville *v.* American Tract Society, 123 Mass. 129.
Warner *v.* Jones, 140 Mass. 216.

But the court might properly require the defendants to offer the whole deposition if they wished to put in the two answers referred to. There is nothing in the record to show that all the answers did not relate to the same subject as that referred to in these interrogatories.

Lynde *v.* McGregor, 13 Allen, 172.
Citizen's Bank *v.* Rhutasel, 67 Iowa, 316.
See also Linfield *v.* O. C. R. R. Co., 10 Cush. 562.
Rules Superior Court, Massachusetts, common law, XLI.

VI.

Exclusion of certain questions to Edward Preble (errors 12, 13) and of record of suit by Edward Preble against the defendants (error 17).

1. The defendants asked Edward Preble on cross examination "were you in good standing financially among your

acquaintances in the fall of 1879," and the question was excluded. Defendants stated that they "desired to show by the witness that he did not undertake to resort to anything else except to his mother's property which he intended to steal: that he did not resort to the ordinary methods which other men would use to raise money at that time."

There was no controversy between the parties that Edward Preble stole and intended to steal these securities. It was the basis of the plaintiff's claim. The defendants had therefore no occasion to show the facts which they offered to show. But the question excluded had no tendency to show them and the defendants put no further question on the subject.

2. The question to Edward Preble as to what property he had brought suit upon against the defendants was rightly excluded as calling for the contents of a written document. It was not the best evidence.

It is an indispensable rule of law that evidence of an inferior nature, which supposes evidence of a higher in existence and which may be had, shall not be admitted.

Commonwealth *v.* Kinison, 4 Mass. 646.
Waterman *v.* Robinson, 5 Mass. 303.

3. The Court rightly excluded the record of the Superior Court in the county of Suffolk against these defendants. (Rec., page 17.)

The question as to what claim Edward Preble had made upon the defendants was wholly collateral and immaterial to the issue in the case at bar. The court in its discretion permitted the defendants to cross examine Edward Preble to some extent upon it but the defendants were not entitled to offer evidence to contradict him.

Shurtleff *v.* Parker, 130 Mass. 293.

VII.

Exclusion of evidence of defendant Walley as to certain statements of Mrs. Preble (error 14).

The defendant Walley testified that he was present when Mrs. Preble gave her deposition. He was then asked to state what she said at that time as to where and in whose possession the envelopes were which she had found empty in her box, and the question was excluded. (Rec., page 16.)

The plaintiff had already been inquired of as to what she had stated at that time and had admitted that she made the statement which defendants contended that she did make. (See argument under Point V., *supra*.)

There is nothing in the record from which the Court can determine what answer the defendant Walley was expected to give to this question. It was not claimed or offered to be shown, and it cannot now be argued that his evidence would have tended to contradict Mrs. Preble, and if it had confirmed her statement the defendants were not prejudiced by the exclusion of the question.

VIII.

Admission of evidence of plaintiff's counsel Southard as to statements of Edward Preble to him (error 16).

Edward Preble had testified on cross examination by defendants that he had told Mr. Southard, one of plaintiff's counsel before this case was begun, that defendant Walley had suggested to him or requested him to erase his mother's name from a United States bond. The plaintiff subsequently called Mr. Southard as a witness, and he testified under defendants' objection to the same effect. (Rec., page 17.)

The question as to whether Edward Preble had communicated this fact to anybody was immaterial to the issue in the case at bar but if there was anything in his answers from which an inference could be drawn that he had not so communicated it, it was within the discretion of the Court to admit evidence to show that he had so communicated it.

~~Davis v. Keys, 112 Mass. 430.~~
~~Hathaway v. Evans, 113 Mass. 264.~~
Brooks v. Acton, 117 Mass. 204.
Treat v. Curtis, 124 Mass. 348.
Com. vs Wilson. 1 Gray, 337.

But if the effect of Preble's evidence was that he had communicated the fact to Mr. Southard, the admission of the latter's testimony in confirmation thereof could not have prejudiced the defendant.

IX.

Rulings as to statute of limitations (errors 19, 20, 21, 25, 27, 30, 32).

The writ in this action was dated Jan. 25, 1887, and the defendants contended that the plaintiff could not recover upon any transactions which were had between her and the defendants before Jan. 25, 1881.

Upon this point the Court instructed the jury in accordance with the provisions of Public Statutes of Massachusetts, Chap. 197, Sect. 14.

It was conceded that the plaintiff did not discover the fraud until 1882. (Rec., page 36. Charge of Colt, J.)

"To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was de-

signed to prevent fraud, the means by which it is made successful and secure."

Miller, J., in Bailey *v.* Glover, 21 Wall. 342.
Manufacturers' National Bank *v.* Terry, 144 Mass. 313.
~~Hammond *v.* Hopkins, 143 U. S. 224.~~
Rosenthal *v.* Walker, 111 U. S. 185.
Wood *v.* Carpenter, 101 U. S. 135.
~~Nat. Bank *v.* Carpenter, 101 U. S. 567.~~

X.

Refusal to rule that there was no evidence to authorize a verdict for Mrs. Preble for certain parts, or any part of her claim (errors 22, 23, 24, 28, 31 33, 34).

If the jury believed the evidence of the plaintiff and of Edward Preble there was evidence from which they were entitled to find for the plaintiff on the items included in the verdict as it was finally entered. The weight and sufficiency of the evidence were wholly for their consideration

An objection to the non-existence of evidence to support the verdict and judgment below should specify the particular point upon which evidence is wanted.

Grand Trunk R. R. *v.* Ives, 144 U. S. 408.

The presiding judge was not required to instract the jury upon one aspect of the evidence as presented by defendants' testimony and in relation to particular securities when there was conflicting evidence upon the point (see errors 24 and 28).

The plaintiff made no claim to recover for securities which had been disposed of by defendants, except where they had knowledge that she owned them, and were guilty of bad faith towards the plaintiff, and the issues were clearly

and fully stated by the presiding judge in his charge (Rec., pages 34–37).

That the plaintiff had a legal cause of action against the defendants, if she proved her allegations, will hardly be denied.

ROBERT M. MORSE,
LOUIS C. SOUTHARD,
for SARAH A. PREBLE, *Plaintiff, Defendant in error.*

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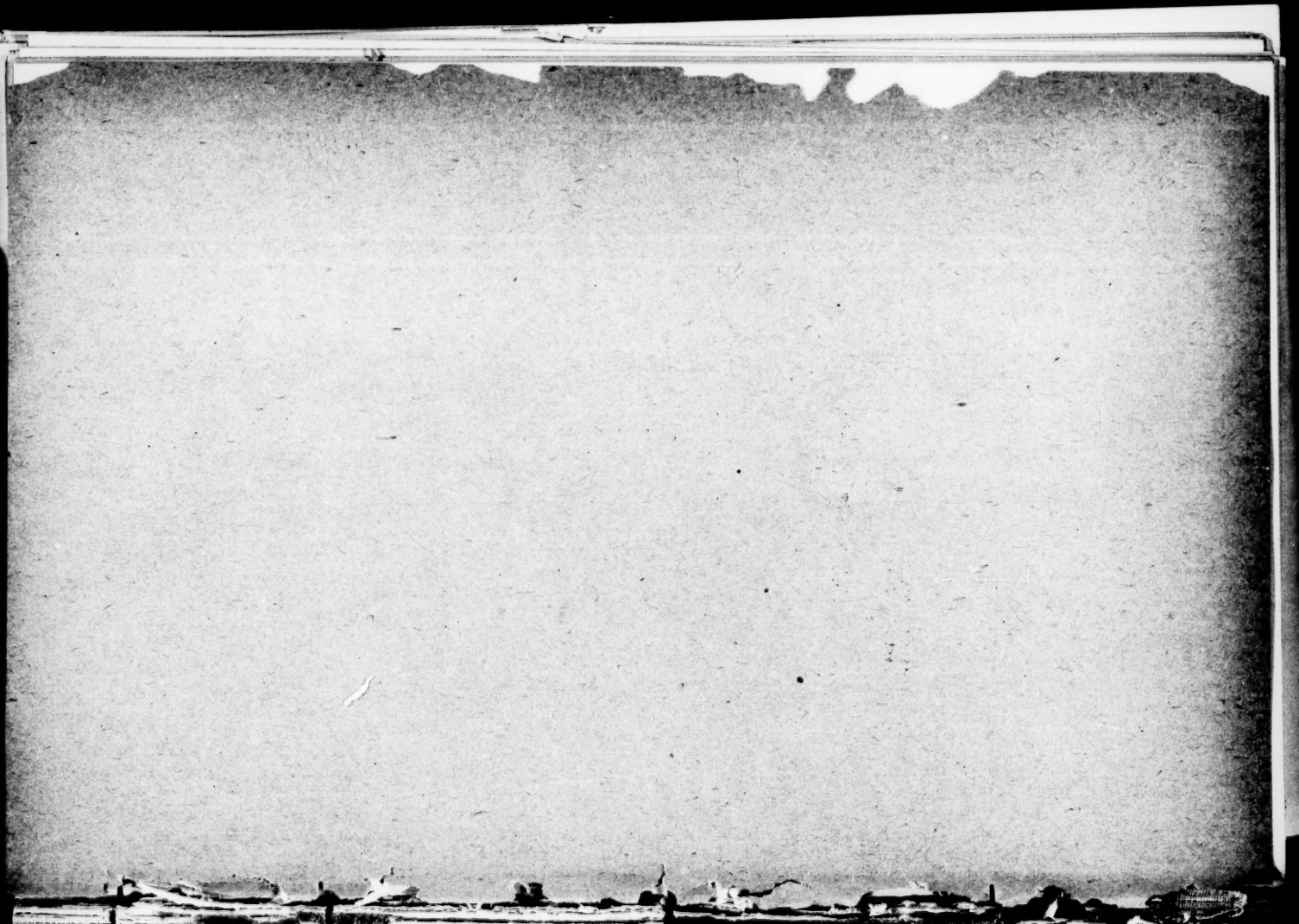
Supplemental Brief for Sarah A. Preble.

ROBERT M. MORSE,
LOUIS C. SOUTHARD,
For Sarah A. Preble, Defendant in Error.



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Supplemental Brief for Sarah A. Preble.

In view of the extended argument upon the evidence in the brief of plaintiffs in error, the defendant in error asks leave to call the attention of the Court to the record in reference to the ownership by Mrs. Preble of the securities included in the verdict of the jury and to their conversion by the plaintiffs in error.

Schedule Returned by the Jury.

$7,000, Minneapolis bonds.
1,000, Eastern Illinois bonds.
3,000, Oregon Navigation bonds.
4,000, Chicago Sewage bonds.
2,000, N. Y. and N. E. bonds.

$7,000, *Minneapolis Bonds.*

These bonds were a part of the estate which came to her by will from her late husband, and appear on the original list and other pages of her book (R., 13, 14, 39, 46), and were in her possession and were seen by her when she visited her box in 1878 (R., 18, 19, 21, 22, 32). This was after the death of Mr. Richardson (R., 21).

[An error makes it appear that Edward Preble was sent home from California before the death of Mr. Richardson (R., 18); this is a mistake (R., 21).]

On cross-examination, Edward Preble testified that he never owned or claimed to own the Minneapolis bonds (R., 16, 25).

There were originally eight of these Minneapolis bonds and the jury found for them all; but, in consequence of a question as to whether Mrs. Preble had not loaned one of them to her son, Edward Preble, in 1877 (R., 8), and in consequenceof the opinion of Colt, J. (R., 50), one of these was remitted (R., 10, 11).

That these bonds went into the hands of Bates and Walley appears from the testimony of Edward Preble (R., 22–24, 25–27), from their book-keeper, George B. Meleney; their books, which were put in evidence, and the testimony of both defendants (R., 28, 29, 30, 31).

The numbers of these bonds were given by defendants themselves, being 252 to 258, inclusive (R., 30).

Both defendants testified that they were not sold by Mrs. Preble's orders (R., 31), and that they were not in the possession of defendants at the time of trial (R., 32), having been sold July 5th, 1881 (R., 29).

The defendants acknowledged possession of these bonds in December, 1880 (R., 29).

$4,000, Chicago Sewage Bonds.

The four thousand dollars, Chicago sewage bonds, were a part of Mrs. Preble's original estate (R., 12, 13, 14, 39, 46, Ex. X, B. F. B.) and were in her possession in 1878 (R., 18, 19) and were seen by her and put in new envelopes (R., 19, 20, 32),

They were delivered into defendants' hands (R., 22, 23. 24, 25) and acknowledged to have been received by the defendants (R., 28–30).

The numbers being by defendant Walley 1439, 1440, 1441, 1445 (R., 30).

They were sold by defendants (R. 23, 28, 30).

The jury found for five bonds, but the defendants testifying that one was sold by Brewster, Bassett & Company and the proceeds paid directly to Ed. Preble, R. 2, 5 in conformity to the opinion of Colt, J. (R., 50), one of these was remitted (R., 10, 11).

The New York and New England, Oregon Navigation, and Eastern Illinois bonds were purchased with the proceeds from the sale of other property which formed a part of her original estate. These reinvestments were authorized by Mrs. Preble, and were made by her direction.

These bonds after their purchase were in the hands of Bates and Wally, the defendants, and were thereafter stolen or embezzled.

From the testimony it appears that Mrs. Preble owned in 1878—

20 shares of Old Colony R. R. stock.

$2,800 4 per cent. U. S. Government bonds.

$3,400 Lewis notes.

About $1,000 on deposit in the Prov. Inst. of Savings.

R., 14, 18, 19, 20, 21.